TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 643

CHARLES YOUNG, APPELLANT,

vs.

ANTHONY MASCI

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

FILED JANUARY 27, 1933

(37,340)

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INDEX

	Original	Print
Record from supreme court of New Jersey	1	1
Summons (omitted in printing)	1	
Complaint (omitted in printing)	2	
Answer of defendant Charles Young (omitted in printing)	4	
Reply of defendant Charles Young (omitted in printing)	6	
Notice re amended complaint (omitted in printing)	7	
Order amending complaint (omitted in printing)	8	
Amended complaint	9	1
Notice of motion to strike out amended complaint and parts thereof	13	4
Reply denying motion to strike	17	6
Answer to amended complaint	19	7
Reply to answer to amended complaint (omitted in printing)	24	
Postea	25a	10
Judgment on postea	25b	11
Postea, Masci vs. Balbino (omitted in printing)	25	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 20, 1933

	Original	Print
Statement of evidence	26	12
Appearances	26	12
Testimony of Anthony Condreras (omitted in printing)	27	
Frank Sibrava (omitted in printing)	42	
Michael Balbino	45	12
Colloquy between court and counsel	63	27
Testimony of Anthony Masci	85	29
Testimony of Salvatore Arnold (omitted in printing)	98	
Motion for non-suit (omitted in printing)	100	
Testimony of Charles W. Young	101	42
Lena Balbino	104	45
Michael Balbino (recalled)	114	54
James Shaw (omitted in printing)	132	
Irwin H. Simon	140	72
Motion for direction of verdict	144	75
Charge to jury	145	76
Plaintiff's exceptions (omitted in printing)	155	
Defendant's exceptions	155	83
Plaintiff's requests to charge (omitted in printing)	157	
Rule to show cause	159	84
Reasons, on rule (omitted in printing)	161	
Opinion per curiam (omitted in printing)	162	
Remittitur	164	85
Notice of appeal	165	86
Exhibits "P-4" and "D-2"—Excerpts from statute (omitted in printing)	171	
Exhibits "P-1" to "P-3"—Photographs (omitted in printing)	173	
Exhibits "P-6" and "P-7"—Photographs (omitted in printing)	173	
Proceedings in court of errors and appeals of New Jersey	174	89
Judgment	174	89
Opinion, Donges, J.	175	90
Petition for appeal (omitted in printing)	181	
Assignments of error	182	95
Order allowing appeal	186	98
Bond on appeal (omitted in printing)	187	
Citation and service (" " ")	192	
Precipe for transcript of record (" " ")	193	
Clerk's certificate (" " ")	194	
Statement of points to be relied upon and designation for printing record	195	99

[fols. a-9]

IN SUPREME COURT OF NEW JERSEY, PASSAIC COUNTY

Action at Law

ANTHONY MASCI, Plaintiff,

vs.

CHARLES YOUNG, Defendant

AMENDED COMPLAINT—Filed Nov. 8, 1930

First Count

Plaintiff, residing in the City of New York, and State of New York, for his amended cause of action, says that:

1. On or about the 4th day of August, 1929, defendant, Charles Young, was the owner of a certain automobile which he caused to be operated in and along a certain public highway known as Arthur Avenue, at or near the intersection of E. 183rd Street, in the City of New York, State of New York, in a general northerly direction.

2. On the said date, one Michael Balbino, was the operator of the said automobile owned by defendant, Charles Young.

3. Said automobile was then being operated with the consent and permission of defendant Charles Young, either express or implied.

4. By virtue of the laws of New York State applicable to the within cause of action because it is transitory, which provide that:

Laws of 1924 (incorporated in the Vehicle and Traffic Act of the State of New York):

Every owner of a motor vehicle or motorcycle, operated upon a public highway shall be liable and responsible for death or injury to person or property, resulting from negli- [fol. 10] gence in the operation of such motor vehicle or

motorcycle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner.

The defendant, Charles Young, is legally responsible for the negligence of the operator Michael Balbino.

5. On said date, plaintiff was a pedestrian, lawfully crossing said Arthur Avenue, at the crosswalk at the intersection of E. 183rd Street, in a general westerly direction.

6. On said date said Michael Balbino did operate the said automobile of Charles Young, in such a careless, negligent and reckless manner, that as a direct and proximate result thereof, he caused same to run into, strike and knock down the said plaintiff, causing him severe and serious injuries.

7. The negligence of Michael Balbino, which is imputable to the defendant, Charles Young, consisted of:

a. Operating the said automobile on the wrong side of the highway,

b. At a high and excessive rate of speed, without proper control,

c. Without giving a proper warning or signal of approach,

d. Without maintaining proper lights, and with defective mechanism and without proper brakes,

e. Without keeping a proper lookout, disregarding the safety of pedestrians lawfully crossing said street,

f. In violation of the laws and decisions of the State of New York, and in violation of the Vehicle and Traffic Act of the State of New York, and

g. Otherwise in a careless and negligent manner.

[fol. 11] 8. As a direct result of the premises aforementioned, and without any negligence or contributory negligence on the part of the plaintiff, he sustained severe and serious injuries of an internal, external and permanent nature. Plaintiff sustained severe lacerations of the scalp, requiring a number of sutures; a compound fracture of the

left leg, permanently injuring same; general body and back injuries; and general internal injuries. He has and will be unable to walk again for the remainder of his life. He has and will be confined to the hospital home and bed for the remainder of his life. He has and will be obliged to expend divers sums of monies for hospital obligations; doctors; operations and for other aids and devices necessary. He has and will be unable to attend to his regular duties; thereby sustaining pecuniary losses. He has and will suffer from headaches, dizziness, nervousness, mental and physical pain, and loss of sleep. His clothes were torn and ruined.

Wherefore plaintiff will demand, as damages the sum of Fifty Thousand ($50,000.00) Dollars, on the first count.

Second Count

1. Plaintiff repeats and reiterates paragraphs one to six inclusive, of the first count, and makes them part of this count.

2. On or about the 2nd day of January, 1930, plaintiff commenced an action at law against Michael Balbino, in the New Jersey Supreme Court charging the said Michael Balbino with negligence in the operation of the automobile owned by defendant Charles Young, a certified copy of which will be offered at the time of the trial.

3. On or about the 8th day of January, 1930, Michael [fol. 12] Balbino was served with the summons and complaint on the plaintiff's cause of action.

4. On or about the 2nd day of June, 1930, after the action was properly noticed, the matter came on for trial, and the jury returned a verdict in favor of the plaintiff and against the defendant, Michael Balbino, in a certain sum, a certified copy of which judgment will be offered at the time of the trial.

5. On or about the 3rd day of June, 1930, a postea was filed with the clerk of the New Jersey Supreme Court, and judgment was accordingly entered on the record.

6. By virtue of the foregoing premises, the judgment returned on plaintiff's cause of action, charging Michael Balbino with negligence in the operation of the automobile

of said Charles Young, at the same time and place as herein mentioned, as a result of one and the same act, adjudicates the negligence of the operator Michael Balbino and the matter is therefore res adjudicata.

7. Plaintiff, repeats and reiterates paragraph eight of the first count of the complaint, as if the same were recited verbatim and makes that count a part hereof.

Wherefore plaintiff will demand as damages the sum of Fifty Thousand ($50,000.00) Dollars, on the first count.

Wherefore plaintiff will claim judgment in the sum of Fifty Thousand ($50,000.00) Dollars, together with costs of suit to be taxed.

Aaron L. Simon, Attorney for Plaintiff.

[fol. 13] In Supreme Court of New Jersey, Passaic County

[Title omitted]

Notice of Motion to Strike Out Amended Complaint and Parts Thereof—Filed Oct. 14, 1930

To Aaron L. Simon, Attorney of Plaintiff.

Sir:

Please take notice, that we shall appear before the Honorable Peter F. Daly, one of the Justices of the New Jersey Supreme Court, or such other judge or Supreme Court Commissioner that shall be sitting in his place or stead, on Saturday, the first day of November, 1930, at the Court House in Paterson, at ten o'clock in the forenoon, or as soon thereafter as counsel may be heard and move for a Rule or Order to Strike Out the Amended Complaint and the parts thereof hereinafter specified upon the grounds hereinafter stated:

1. The entire complaint, upon the ground that the same is so framed as to embarrass and delay a fair trial in violation of Rule 39 of the New Jersey Supreme Court.

[fol. 14] 2. The first count, upon the ground that the same is obscure and uncertain and in violation of the rules of pleading in that the same does not allege any particulars or

certainty as to when, where or how the defendant Charles Young is alleged to have given consent and permission to Michael Balbino to use his automobile.

3. The first count, upon the ground that the same is so framed as to embarrass and delay a fair trial in that the same alleges matters with respect to a statute of the State of New York, particularly set forth in the fourth paragraph of the first count without, in any place, alleging that the defendant Charles Young was ever in the State of New York and without stating any facts by virtue of which the statutes of the State of New York have any force and effect upon said Charles Young.

4. The first count, upon the ground that the same does not state a cause of action.

5. The first count, upon the ground that the same does not state a cause of action, in that the same alleges no act or default by Charles Young from which liability to the plaintiff could arise but undertakes so to apply the New York law quoted in the fourth paragraph of the said amended complaint as to make the defendant Charles Young, who is not alleged to have ever been in New York, liable for negligence of Michael Balbino, while operating defendant's car in New York under a mere loan or bailment made in New Jersey, whereas so to apply the said statute would deny this defendant Charles Young equal protection of the law and take his property without due process of law in contravention of the Fourteenth Amendment to the United States Constitution.

6. The seventh paragraph of the complaint, in so far as the same alleges that the negligence of Michael Balbino is imputable to this defendant in that the said paragraph [fol. 15] states a mere conclusion of law and an erroneous conclusion at that.

7. The entire second count in that it does not allege a cause of action against Charles Young.

8. The first paragraph of the second count, for all of the reasons hereinbefore alleged as grounds for striking out the first count and the several paragraphs and allegations thereof hereinbefore mentioned.

9. The entire second count, upon the ground that the same fails to allege a cause of action against this defendant, in that the same does not allege that this defendant had any notice that the case mentioned in said second count would come on for trial on June 2nd, 1930, or at any other time and if a judgment against Michael Balbino could in any case preclude the defendant Charles Young from defending an action by the present plaintiff in any way or manner for the said Charles Young to be so interfered with in the defense of an action because of judgment against Michael Balbino in an action in which he had no notice that any judgment was to be entered, would deprive the said Charles Young of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

10. The second to sixth paragraphs of the second count, in that they are so framed as to embarrass and delay a fair trial in that the same alleged matters and transactions between the plaintiff and a third party, Michael Balbino, without alleging any facts on account of which a judgment against Michael Balbino could, in any wise, be binding upon the defendant Charles Young, or interfere, to any [fol. 16] degree, with the full defense of any action which might be brought against the said Charles Young by the plaintiff Anthony Masci.

Yours, etc.,
Kellogg & Chance, Attorneys for Defendant.

Dated: October 9th, 1930.

Service acknowledged this 11th day of October, 1930.
Aaron L. Simon, Attorney for Plaintiff.

[fol. 17] In Supreme Court of New Jersey, Passaic County

[Title omitted]

Rule Denying Motion to Strike Out Amended Complaint and Parts Thereof—Filed Nov. 14, 1930

This matter being opened to the court by Kellogg & Chance, attorneys for the defendant in the presence of

Irving Simon, Esquire, representing Aaron L. Simon, Esquire, attorney of plaintiff, and it appearing that notice of motion to strike out amended complaint and parts thereof be made November 1st, 1930, which notice was dated October 9th, 1930, was duly served upon plaintiff's attorney; and it further appearing that on the first day of November, 1930, said motion was postponed to November 7th, at two P. M., by the Honorable Peter F. Daly, Justice of the Supreme Court and referred to the undersigned for hearing and determination, and the said motion having been duly made and the arguments of counsel for the respective parties having been heard and considered,

It is, on this 12th day of November, 1930, ordered that the said motion be, and the same hereby is denied.

[fol. 18] And it is further ordered that the defendant Charles Young have twenty days from the date hereof in which to file answer to the said amended complaint.

William B. Mackay, Judge.

[fol. 19] In Supreme Court of New Jersey, Passaic County

[Title omitted]

Answer to Amended Complaint—Filed Nov. 14, 1930

Defendant residing in the City of Passaic, County of Passaic and State of New Jersey for answer to the complaint herein says:

First Defense to First Count

1. Answering the first paragraph of the first count this defendant admits that on August 4th, 1929, he was the owner of a certain automobile, but denies the other allegations of the first paragraph.

2. The second paragraph of the first count is denied, except that this defendant admits on information and belief that Michael Balbino did operate his automobile on said date.

3. Answering the third paragraph of the first count this defendant admits that he loaned his automobile in the State

of New Jersey to Michael Balbino. Except as thus admitted the third paragraph of the first count is denied.

4. The fourth paragraph of the first count is denied, except that part thereof which purports to quote a statute of the State of New York as to the particulars of which this defendant makes no admission or denial, except that [fol 20] he denies that it has any application to this case or ever imposed any obligations upon this defendant, who at all times mentioned in the complaint was located in the State of New Jersey and had no knowledge or information concerning the statutes of New York.

5. On information and belief the fifth paragraph of the complaint is denied, except that this defendant admits information that the plaintiff was on the street on the date mentioned.

6. On information and belief the sixth paragraph is denied, except that he is informed that a collision between his automobile and the plaintiff did take place.

7. The seventh paragraph of the first count is denied, except that this defendant has no knowledge or information sufficient to form a belief as to the extent of any injuries and damages to the plaintiff.

Second Defense to First Count

At the time and place of the happening of the accident inaccurately described in the complaint defendant's automobile was not being driven by this defendant, or for this defendant and was not being driven in and about the business of this defendant or by anyone for whose conduct this defendant is responsible.

Third Defense to First Count

This defendant loaned his car to Michael Balbino in the State of New Jersey and at the said time did not know about any such statute in the State of New York as is alleged in the first count of the amended complaint and claims that to apply the said statute so as to make this defendant liable for anything done or omitted by Michael Balbino who was not this defendant's agent or servant, [fol. 21] would amount to confiscation, would deny this defendant equal protection of the law and take his property

without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

Fourth Defense to First Count

The accident inaccurately described in the complaint was caused and contributed to by the negligence of the plaintiff in that he failed to exercise reasonable judgment as to when and how to cross the street, failed to make reasonable effective observation before crossing the street and while in the act of passing over same and furthermore the plaintiff as this defendant is informed, after the defendant Michael Balbino had blown the horn of the automobile involved, stopped and so conducted himself as to indicate that he was to permit the said Michael Balbino to have the right of way, and after so doing suddenly proceeded forward and into and against the automobile in question, and otherwise recklessly, negligently and carelessly conducted himself.

First Defense to Second Count

1. The answer made by paragraphs one to six, inclusive of the first defense to first count are repeated in answer to the first paragraph of the second count.

2. Answering the second paragraph of the second count this defendant admits information and belief that the allegations contained in the second paragraph of the second count are true.

3. This defendant has no knowledge as to the matters alleged in the second paragraph of the second count, but is informed that the allegations therein contained are true.

[fol. 22] 4-5-6. This defendant has no knowledge or information sufficient to form a belief as to the matters alleged in the fourth, fifth and sixth paragraphs of the complaint, except that he avers that no notice was received by him that action of the plaintiff against Michael Balbino was to come on for trial on June 2, 1930, or that the matter of the plaintiff against Michael Balbino was to be submitted to a jury or tried on that date.

7. The answer made by the first defense to the first count to paragraph eight of the first count is repeated in answer to the seventh paragraph of the second count.

Second Defense to Second Count

The second defense to first count is repeated as a second defense to the second count.

Third Defense to Second Count

The third defense to the first count is repeated as a third defense to second count.

Fourth Defense to Second Count

The fourth defense to first count is repeated as a fourth defense to the second count.

Fifth Defense to Second Count

This defendant had no notice that action of plaintiff against Michael Balbino would come on for trial or be submitted to a jury for verdict on the said date (June 2, 1930) and the said Michael Balbino was not the agent or [fols. 23 & 24] servant of this defendant. Wherefore, this defendant maintains that to treat the judgment against Michael Balbino as binding upon this defendant or as preventing this defendant from contesting liability to the plaintiff would deny this defendant equal protection of the law and take his property without due process of law in contravention of the Fourteenth Amendment to the United States Constitution.

Kellogg & Chance, Attorneys of Defendant Charles Young.

[fol. 25-a] In Supreme Court of New Jersey, Passaic County

Action at Law

Anthony Masci, Plaintiff,

vs.

Charles Young, Defendant

Postea—Filed March 4, 1931

The above entitled cause of action was referred for trial before Judge William B. Mackay and a mixed jury of

twelve, in the above entitled court, on February 25, 1931, and February 26, 1931, which resulted in the jury having rendered the following verdict:

For the plaintiff, Anthony Masci, against the defendant, Charles Young, the sum of Fourteen Thousand ($14,000.00) Dollars.

William B. Mackay, Circuit Court Judge.

Dated: February 26, 1931.

[fol. 25-b] In Supreme Court of New Jersey

Action at Law

Anthony Masci, Plaintiff,

vs.

Charles Young, Defendant

$14,000.00

On Postea

Judgment

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of fourteen thousand dollars, besides costs to be taxed nisi.

On motion of

Aaron L. Simon, Attorney.

Entered March 4, 1931.

See Min. Oct. Term 1931 under date of Nov. 24, 1931.

Above R. to S. C. dischgd. and verdict reduced to $10,000.00

99.12

$10,099.12

[fols. 26-44] In Supreme Court of New Jersey, Passaic Circuit

At Law

Anthony Masci, Plaintiff,

vs.

Charles Young and Michael Balbino, Defendants

Statement of Evidence

Paterson, N. J., February 25, 1931.

Before Hon. William B. Mackay, Judge, and a Jury.

Appearances:

For the Plaintiff: Aaron L. Simon, Esq.
For the Defendant Young: Kellogg and Chance, Esq., by Robinson Chance, Esq.

(A jury was called and sworn.)
(A recess was taken until 1:35 P. M.)

Afternoon Session, 1:35 P. M.

* * * * * * *

[fol. 45] Michael Balbino, sworn.

Direct examination.

By Mr. Simon:

Q. Mr. Balbino, where do you live?
A. 345 Passaic Avenue, Lodi, New Jersey.
Q. On August the 4th, of 1929, were you driving an automobile in New York City, corner of 183rd Street and Arthur Avenue?
A. Yes.
Q. Your car met with an accident?
A. Yes.
Q. And Mr. Masci, this gentleman here, is that the gentleman that was hurt (indicating the plaintiff)?
A. Yes, sir.
Q. Well, now, whose car was this?

A. Mr. Young's.

Q. How did you come to get this car?

A. Well, I asked Mr. Young for a loan of his car.

Q. Yes, and what did he say?

A. He says, "O. K."

Q. And who was with you in this car?

A. My wife, my kiddies, and my in-laws.

Q. And where did you tell Mr. Young you were going?

A. I told Mr. Young that I was going to some beach, but [fol. 46] I didn't tell him what beach it was.

Q. A beach where?

A. Well, I just told you I told him I was going to some beach, but I didn't mention the beach where I was going to.

Q. What did you have in mind?

A. Down to Rye Beach.

Q. Rye Beach. You told him you were going to Rye Beach. Where is that?

A. I didn't exactly tell him Rye Beach.

Q. What were the words you told him, again?

A. I told Mr. Young that I was going to some beach, but I didn't mention what name of the beach I was going to.

Q. I see. Did you tell him where this beach was at all?

A. No, sir.

Q. Sure about that?

A. No, sir.

Q. Did you tell him whether this beach was in New York State?

A. I didn't tell him where Rye Beach was. I simply told him that morning that I was going to some beach.

Q. You said Rye Beach; you went to Rye Beach?

A. I am telling you that I went to Rye Beach, yes.

Q. You say you didn't tell him where Rye Beach was?

A. No, sir, he didn't ask me what beach, what was the name of the beach.

Q. I see. You told him that you were going to a beach?

A. To some beach.

Q. To some beach?

A. Yes.

Q. And you didn't tell him where the beach was?

A. No, sir.

Q. Well, now, who lived in Rye Beach?

Mr. Chance: I object to that as immaterial.

Mr. Simon: I am going to show the materiality of this. I am going to show it is very, very important. I plead surprise, if your Honor please.

Mr. Chance: I object to it.

[fol. 47] The Court: That question is not relevant.

Mr. Simon: I am going to lay the foundation, if your Honor please, for the purpose of this trip to prove—to impeach his testimony by a statement that I have.

The Court: Impeach your own witness?

Mr. Simon: Yes.

Mr. Chance: You are impeaching your own witness.

Mr. Simon: To neutralize his testimony.

The Court: You can't impeach his testimony.

Mr. Simon: I am taken by surprise, and I am going to neutralize his statement. He made a statement in our office under oath, and we have the statement here with us, and I certainly am surprised at it.

The Court: Well, that question you asked is not relevant.

Mr. Simon: It is not relevant?

The Court: No.

Mr. Simon: Well, it is going to lay the foundation why he said he was going to Rye Beach.

By Mr. Simon:

Q. Well, now, were you in my office at all?

A. Yes, sir.

Q. Did you make a statement in my office as to where you were going and what you told Mr. Young where you were going?

A. I told you I didn't tell Mr. Young what beach I was going to; I just told him a beach.

Q. You told me that?

A. I didn't tell Mr. Young that I was going to Rye Beach, no, sir.

Q. Is this your statement, Michael Balbino (handing a paper to the witness)? Is that your signature there?

A. Yes, sir, that is mine.

Q. No doubt about it?

A. Yes, that is my signature.

[fol. 48] Q. I see. Now, did you say in my offices on March 24, 1930——

Mr. Chance: I object to counsel reading from any document which is not in evidence.

Mr. Simon: I am laying a foundation for it. I will put it in evidence at the proper time.

Mr. Chance: My objection is reading from any document that is not in evidence.

The Court: Well, you have now what? What is it?

Mr. Simon: A statement made in my offices.

The Court: A statement made in your office?

Mr. Simon: That he told Mr. Young where he was going, to Rye Beach.

The Court: Who prepared the statement?

Mr. Simon: My offices did.

The Court: We must find out from him, if he knows about it.

By Mr. Simon:

Q. Did you tell the young man in my office——

The Court: No, show him the statement.

Q. I show you a statement that you signed, Michael Balbino, on November 10, 1930——

The Court: Well, did he sign it?

Q. Did you sign it?

A. Yes, sir, that is my signature.

Q. All right. Is that the statement you signed on November 10, 1930?

A. Yes, sir, that I was going to Rye Beach.

Q. That is the statement you signed?

A. Yes.

Q. Did you read it?

A. Yes.

Q. Read it again and see whether or not that is the statement you signed and if it is the same statement that you now have in your hands. That is true, isn't it, as you said?

A. Yes.

[fol. 49] Mr. Simon: I offer it in evidence.

Mr. Chance: I object to its going in evidence.

The Court: Why?

Mr. Chance: Because it is incompetent for this man to prove his case by producing a signed statement which is signed by a witness called by him.

The Court: It is his own witness. He is calling him to refresh his recollection of past events.

Mr. Chance: His recollection has either been refreshed or it has not, and it doesn't appear that it has not been refreshed. That being so, why, he can testify without the paper.

By the Court:

Q. Well, you have looked at that paper, haven't you?

A. Yes, sir, your Honor.

Q. And you have read it?

A. Yes.

Q. And you signed it, did you?

A. Yes, sir. Yes, sir.

Q. And is the statement contained in that paper true?

A. Yes, sir.

Q. It is. Now, then, what is the situation? What is the fact? What did you say to Mr. Young, having refreshed your recollection?

A. I told Mr. Young if I could borrow his car, and I recall I told him I was going to some beach and I didn't mention the name of the beach that I was going to. That is the truth.

Q. Didn't you tell Mr. Young you were going to Rye Beach?

A. No, sir, your Honor. I told Mr. Simon that, not Mr. Young.

Q. You told Mr. Simon that?

A. Yes, sir.

Q. Well, then, this writing that you are referring to is something that you told Mr. Simon; is that it?

A. Yes, sir.

[fol. 50] Q. But what you told Mr. Simon, you said, is what you told Mr. Young, but that is not so; is that it?

A. No, sir.

Q. Well, then, you didn't tell Mr. Simon the truth; is that it?

A. Well, Mr. Simon asked me where I went, so I told him I went to Rye Beach, but I didn't tell Mr. Young that morning where I was going with my family. All I told him, I was bound to some beach, I don't know where.

Q. Well, weren't you asked by Mr. Simon or someone in his office about this matter?

A. Yes, sir.

Q. Well, now, didn't you say "On the morning of the accident, about nine o'clock or so, Mr. Young gave me permission to use his car"?

A. Yes, sir.

Q. And is that so?

A. Yes.

Q. Was that true?

A. Yes, sir.

Q. And then is it true that he, Mr. Young, "asked where I was going and I remember saying to him that I was going to Rye Beach with my family and in-laws"? Is that so?

A. I told him I was going to some beach, but I didn't mention the beach to him.

Q. Well, then this statement to Mr. Simon wasn't true; is that right?

A. It is true that I went to Rye Beach.

Q. No, but I mean it is not true that you told that to Mr. Young; is that it? You said that Mr. Young asked you where you were going?

A. Yes.

Q. And you said you remember telling Mr. Young that you were going to Rye Beach with your family and your in-laws? Did you or didn't you?

A. Well, I didn't tell him that I was going—to some beach. I mentioned it was some beach, I didn't know where I was bound for.

Q. Then, this wasn't a correct statement; you didn't tell Mr. Young this?

A. No, sir; I didn't tell Mr. Young.

[fol. 51] Q. But you told Mr. Simon that you told Mr. Young that, didn't you?

A. I don't recall that.

Q. Well, it is there, isn't it, or what about it? Tell us what about it.

A. This is my signature, but that is not my handwriting.

Q. Well, it says there that Mr. Young asked you where you were going.

A. And I told him that I was going to some beach, I don't know what beach it was.

Q. And you told him, Mr. Young, you were going to Rye Beach with your family and in-laws?

A. I don't recall that, your Honor.

Q. You don't remember that?

A. No, sir.

Q. You said further, "Mr. Young knew I was going to New York, and I certainly am surprised to hear that the truth is doubted. I have read the above and am willing to swear to its truth." What about that? Is that so?

A. All I told him I was going to some beach.

The Court: I don't understand that myself.

By Mr. Simon:

Q. Is it true that Mr. Young knew that you were going to Rye Beach?

Mr. Chance: I object to that because it is immaterial what he told him. He loaned him the car, and the liability as a bailee in this State was established by Doran against Thompson and other cases, and it is immaterial what the man knew about where the car was going.

Mr. Simon: We say it is very material as to where he was going, because we base our action upon the New York statute.

Mr. Chance: The New York statute doesn't apply in New Jersey.

Mr. Simon: Well, that is a question for the Court. At this time we say it is very material, and it will be a ques-[fol. 52] tion for his Honor to decide later on, whether it is material.

By Mr. Simon:

Q. Did you know at the time that you borrowed the car that you were going to Rye Beach?

A. No, sir.

Q. When did you first make up your mind to go to Rye Beach?

A. The last moment.

Mr. Chance: I object to it as immaterial when he made up his mind to go to Rye Beach.

Mr. Simon: I am laying the foundation for it.

Mr. Chance: The mental processes of this man are no foundation for liability on Mr. Young's part.

The Court: I will let it stand.

By Mr. Simon:

Q. You were brought over to my offices, were you not?

A. Yes, sir.

Q. And at that time you were showed an answer by the defendant, through Mr. Chance, that they denied that you had permission to go to New York and then you were asked for a statement, were you not?

Mr. Chance: I object to that because there is no such answer and it contains no warrant for assumption of the fact that there is.

By Mr. Simon:

Q. You were asked to give us a statement then, weren't you?

A. You asked me to give you a statement.

Q. Yes.

A. Yes.

Q. Is it true, then, that you said at that time. "I remember saying to him"—meaning Mr. Young—"that I was [fol. 53] going to Rye Beach with my family and in-laws"?

A. I told you that. I told him I was going to some beach. I told Mr. Young; whatever beach that was I didn't know.

Q. Did he ask you what beach?

A. No, sir.

Q. I see. Do you now say that you never told me, myself, that you told Mr. Young you were going to Rye Beach and he knew it?

Mr. Chance: I object to it as immaterial what he told him.

Mr. Simon: I am going to take the stand.

Mr. Chance: It is no proof of the case against Mr. Young what conversation took place between Mr. Simon and Mr. Balbino. Mr. Young is not alleged to have been present, nobody shows him to have been present at any conversation between those two gentlemen, and I claim this is going far afield to try to prove liability on the part

of Mr. Young by some conversation between Mr. Simon and Mr. Balbino, and I object to the question.

The Court: Well, except that if he made this written statement to the effect that he had actually told this man he was going to Rye Beach and he says that statement is true, that he signed it as true, it certainly does not correspond with what he has been testifying to on the witness-stand, and I suppose on his plea of surprise counsel is entitled to neutralize the effect of that testimony and attempt to show what the fact really is.

Mr. Chance: Well, if he has not proved his case on his questions, I don't see, if your Honor please, that he proves it any more by trying to prove some conversation at some other time when the man wasn't under oath.

The Court: Well, this is the man that took the car; this is the man that was driving the car.

[fol. 54] Mr. Chance: Yes.

The Court: And this is the man that obtained the car.

Mr. Chance: Yes.

The Court: Certainly, anything relating to his method of obtaining the car, I should say, would be quite material.

Mr. Chance: Yes, anything which relates to the method of his obtaining the car is material, but not the conversation that took place some other time.

The Court: Now, then, this witness told him before the trial that he, in borrowing this car, said to the owner, "I am going to Rye Beach." That was put in writing and he signed it. He made a statement of the fact at that time. Now, it must be a surprise to have that statement, signed by the witness and which he now admits to be a true statement, to have him testify before the statement is shown to him that that is not the fact, and then when shown the paper say, "Yes, that is true"; and then he said, "Well, I told that to Mr. Simon, but that is not the fact." So I should think that that paper would be material in this case.

Mr. Chance: Well, there is another consideration, that he called this man as his witness and he is trying to impeach the witness. I object to the performance on that ground, further.

The Court: It is not impeaching.

Mr. Chance: The thing I am getting at is that a transaction between Mr. Balbino and Mr. Simon is a transac-

tion between other parties than Mr. Young, and it is mere hearsay conversation, something that took place at another time and is not evidential.

The Court: Well, now, is it hearsay?

[fol. 55] Mr. Chance: It seems to me that it is hearsay. The transaction took place between Mr. Young and Mr. Balbino in the first instance at the time when he borrowed the car.

The Court: Yes.

Mr. Chance: Now, then, any admissions or statements——

The Court: That was the transaction, wasn't it?

Mr. Chance: That was the transaction.

The Court: All right.

Mr. Chance: But not which took place when this man was taken up to Dr. Simon's office—that wasn't the transaction. That was an admission or a statement made by this man which cannot be binding upon Mr. Young. That is the reason I object to it.

The Court: Well, now, why can't it?

Mr. Chance: Because there is nothing in the case that he was ever authorized to go to Dr. Simon's office and make statement for Mr. Young.

The Court: He is the man borrowed the car.

Mr. Chance: Yes, but borrowing the car doesn't authorize a man to go to Dr. Simon's office and make statements for Mr. Young.

The Court: You didn't object to the question when it was asked, as to how he obtained the car and what was said, did you?

Mr. Chance: No, I don't object to this man's testifying as to anything that took place on that day.

The Court: And yet from your argument you say it is irrelevant.

Mr. Chance: No, what I say is irrelevant is his statement made to Dr. Simon at a later date about what took place before.

The Court: Well, you would rely on that.

[fol. 56] Mr. Chance: No, I wouldn't.

The Court: Yes. Here is the man borrowed the car.

Mr. Chance: Yes.

The Court: He took the car. Now, under what conditions did he take it? What did he have to do?

Mr. Chance: That is all right.

The Court: What authority did he have?

Mr. Chance: That is another thing.

The Court: Now, he gets on the stand and he says, and you don't object to it—he said what he told Mr. Young.

Mr. Chance: No objection to that.

The Court: You don't object.

Mr. Chance: That is the transaction.

The Court: All right. He then tells Mr. Simon, "This is what I told Mr. Young," when he gets on the witness-stand, and Mr. Simon said, "Wait a minute. Is that what you told Mr. Young?"

"Yes."

"Are you sure?"

"Yes."

"Well, didn't you make a statement at another time in contradiction of that, which is different?"

Mr. Chance: Well, he hasn't said that he made a statement different. He says he signed that paper, but he hasn't said he said what is in it.

The Court: He said, "No," he didn't make another statement contradicting that, and he said, "Well, let me show you a paper. Is that paper true?"

"Yes."

"Well, doesn't that contradict it?"

Well, then, he says, "No."

[fol. 57] "No?"

Now, then, what is the explanation? I think that is all relevant, all of that testimony. It appears to be, under the D'Adamo case, State vs. D'Adamo. It appears to be relevant under the evidence. It appears to be relevant under the Morline case.

Proceed. What is the next question?

By Mr. Simon:

Q. Do you remember you were here last week in court?

A. Yes, sir.

Q. Do you remember my having asked you whether or not you were subpœnaed by the defendant and you said, "Yes"?

A. Yes, sir.

Q. And at that time I asked you whether or not you were going to tell the same story as you told in my office and you said, "Yes"?

A. Yes, sir.

Q. Yes. And then you further said, "You needn't worry; I won't double-cross you"? Do you remember saying that?

A. Yes.

Q. Well, now, since when did you change your story?

Mr. Chance: I object to that, because he has not said that he changed his story yet. He has not ever said that he said exactly what is in this paper that you have.

By Mr. Simon:

Q. You made a statement wherein you said——

Mr. Chance: I object to reading from any statement that is not in evidence.

By Mr. Simon:

Q. Did you say to Mr. Young that, "I am going to Rye Beach with my family and in-laws"?

A. I told Mr. Young that morning I was bound to some beach.

[fol. 58] Q. No, did you say to Mr. Young that, "I was going to Rye Beach with my family and in-laws"?

A. I didn't mention Rye Beach.

Q. You didn't mention Rye Beach?

A. Not to Mr. Young, no, sir.

Q. So, then, this statement that you mentioned to him isn't true, then, is it?

A. I didn't tell Mr. Young I was going to Rye Beach. I told him I was bound to some beach.

Q. So that is not true here?

A. That is the statement I gave you, that I was going to Rye Beach.

Q. Yes. "I remember saying to him I was going to Rye Beach"; is that true or not true?

A. That Mr. Young knew I was going to some beach.

By the Court:

Q. What do you mean? Do you mean that that is the statement you gave to Mr. Simon, that you were going to Rye Beach?

A. He asked me where I went, so I told him I went to Rye Beach with the car, I was bound for Rye Beach, but the morning I left from home I didn't tell Mr. Young I was going to Rye Beach. I told him I was bound to some beach, but I don't know what beach it will be.

Q. But why did you say in that paper that you told Mr. Young you were going to Rye Beach? What did you mean by that? Do you mean you don't understand it?

A. I don't understand it.

Q. Why didn't you understand it? What didn't you understand about it?

A. Well, I didn't mention Rye Beach to Mr. Young that morning.

By Mr. Simon:

Q. Did he ask you where you were going—Mr. Young?

A. Yes, sir.

Q. And what did you tell him then?

A. I told him I was bound to some beach, I don't know where.

[fol. 59] Q. Have you any members of your family or somebody connected or directly related to you who live in Rye Beach?

Mr. Chance: I object to it as immaterial. We don't care whether he has anybody in Rye Beach.

By Mr. Simon:

Q. Now, nobody told you not to say that you were going to Rye Beach because Rye Beach is in New York state, did they?

A. No, sir.

Q. Why is it, then, that you told me last week, right in this court room, "You needn't worry; I won't double-cross you; I will stick to the statement I made"?

A. I don't quite understand you.

Q. Did anybody talk to you about this case since last week?

A. Since last week?

Q. Yes.

A. Yes, you did.

Q. Yes. Besides me did anybody talk to you?

A. Yes, sir, your brother.

Q. Yes. And besides my brother and I did anybody talk to you about this accident?

A. No, sir.

Q. You are sure about that?

A. Yes.

Q. Then, why is it—are you sure about it, that from the time I talked to you last week, or my brother, until the time you took the stand, nobody else talked to you about this accident?

A. You mean to-day?

Q. Yes.

A. Outside of Mr. Chance.

Q. Mr. Chance spoke to you?

A. Well, he wasn't sitting down——

Q. Did he ask you anything about this accident?

A. Why, no.

Q. What?

A. He didn't ask me.

Q. He said nothing at all about the accident?

A. I just told him how it happened and where I went to. [fol. 60] Q. Did he ask you whether or not you told Mr. Young where you were going?

A. I told Mr. Chance the same thing I told Mr. Young, that I was bound to some beach and I didn't know what beach it would be.

Q. Yes. When I asked you to tell what happened you never told me that you were bound for some beach, but you didn't know what beach it was going to be?

A. I told you I was going to Rye Beach. I went to Rye Beach.

Q. Yes.

A. But I didn't say that to Mr. Young.

Q. You didn't say that to Mr. Young?

A. No, sir. I told him I was bound to some beach, but I don't know where.

Q. Isn't the reason why you changed your story now from the statement that you made because you found out that Rye Beach is in New York State and you didn't want the law of New York State to govern?

Mr. Chance: I object to that question, if your Honor please, because it is too indefinite as to what this change of story is that is alleged.

The Court: I think so.

By Mr. Simon:

Q. Mr. Young asked you where you were going and you said, "To some beach"?

A. Yes.

Q. Did he ask you then what beach?

A. No, sir.

Q. Did he ask you whether the beach was in New Jersey or New York or Pennsylvania or anywhere else?

A. No, sir.

Q. And how long did you take the car for?

A. Practically a day.

Q. Did he ask you how long—withdraw that. Did he [fol. 61] tell you how long you could have the car for?

A. Until the next morning. I returned it to him.

Q. To the next morning?

A. That was Monday morning, yes.

Q. He didn't tell you that you can't go to New York State beach or in New York, did he?

A. Of course, not.

Q. He didn't tell you that you couldn't go to any beach that you wanted to go to, did he?

A. Of course, not.

Q. He told you, after you asked him that you wanted the car to go to some beach, he says you can go where you want to; is that right?

Mr. Chance: I object to it as a leading question.

By Mr. Simon:

Q. What is true, then?

A. Mr. Young loaned me the car, and he didn't ask me to go anywheres I went with it. I just went on my own hook, that is all.

Q. Well, now, you never borrowed Mr. Young's car before that, did you?

A. No, sir.

Mr. Chance: I object to it as immaterial.

The Court: I will sustain it.

By Mr. Simon:

Q. In other words, he gave you permission to take that car for the day, or until the next morning?

Mr. Chance: Well, I object to that. That calls for a conclusion.

A. Yes, sir.

Mr. Simon: That is all.

[fols. 62-72] Cross examination.

By Mr. Chance:

Q. Who sent for you to come up to Dr. Simon's office?
A. Why, I got home—I got home and my wife told me there was somebody wants you to go down to the office, so I went down.

Mr. Chance: That is all.

* * * * * * *

[fol. 73] COLLOQUY

The Court (after reading): Yes, that seems to be clear. The statute in question that affects this case, as I understand it, is Section 59 of the Motor Vehicle Law and the part of Section 59 that applies is: "Every owner of a motor vehicle or motorcycle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle or motorcycle, in the business of such owner or otherwise, by any person legally using or operating the same, with the permission, express or implied, of such owner."

That seems to be the——

Mr. Chance: Well, I contend that there is another sec-[fols. 74 & 75] tion, Section 70, and the other provisions than 59, and also 52, which must be read in connection with 59 in order to gather the purpose and purport of the whole thing.

The Court (after reading): Yes. Well, that disposes of that. I will hold that this statute, this portion of the statute, governs in this case.

Mr. Simon: Will it be necessary for me to offer it in evidence?

The Court: Oh, yes.

* * * * * * *

Mr. Simon: I haven't properly offered it in evidence yet, Judge.

At this time I will offer in evidence Section 59 of the Vehicle and Traffic Law as read by your Honor.

* * * * * * *

[fol. 76] Mr. Chance: And I object to it, further, on the ground that it is irrelevant and immaterial to the controversy in this case.

And, further, that to so apply this statute, which has been offered in evidence here, as to subject Mr. Young, who was not in New York, to liability for anything done by Michael Balbino, who was operating Young's car as a mere bailee, would deny to Mr. Young, the defendant, equal protection [fols. 77 & 78] of the laws and take his property without due process of law, in contravention of the Fourteenth Amendment to the United States Constitution.

* * * * * * *

[fols. 79-83] The Court: Now, is there anything more?

Mr. Chance: If it is admitted, I note my exception to the ruling, the grounds of my exception being all those that I have just urged in my statement of why I oppose its admission.

* * * * * * *

[fol. 84] Mr. Simon: I will offer in evidence at this time Section 59——

The Court: It has been offered; he has the record of it. We understood that.

Mr. Simon: There won't be any objection?

The Court: Just mark it in evidence.

Mr. Chance: That has been done.

The Court: It is in evidence and Mr. Chance has his exception; is that correct?

Mr. Simon: May I now read it to the jury? Section 59 of the Vehicle and Traffic Law of New York reads, "Every

owner of a motor vehicle or motorcycle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from the negligence in the operation of such motor vehicle or motorcycle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner."

[fol. 85] ANTHONY MASCI, sworn.

Direct examination.

By Mr. Simon:

Q. Mr. Masci, where do you live in New York?
A. 2122 LaFontaine Avenue.
Q. New York?
A. Yes.
Q. Now, on August 4th, of 1929, were you anywhere near 183rd Street and Arthur Avenue?
A. Yes.
Q. How far is that from your house?
A. Well, about four blocks, I think.
Q. And what day of the week was it?
A. What do you mean?
Q. What day of the week?
A. Oh, on the 4th of August, Sunday morning.
Q. Sunday morning. About what time, Mr. Masci?
A. About half-past ten or eleven o'clock.
Q. Was the weather clear or cloudy? Was it a nice day or not?
A. Oh, it is a fine day, yes.
Q. And who was with you at that time? Anybody with you?
A. No, all alone.
Q. I see. Well, now, where were you going?
A. I going to buy the paper, because it is Sunday, you know, see.
Q. I see. Well, now, where were you going to cross? What street were you going to cross?
A. 183rd Street and Arthur Avenue.
Q. 183rd Street and Arthur Avenue?
A. Corner of Arthur Avenue.

Q. That is in New York City?
A. Yes.
Q. Do you know anything about directions, east or west or north and south?
A. Well, I know east and west, certainly.
Q. Do you?
A. I know.
Q. I show you some photographs, some pictures.
A. Yes?
Q. Are these pictures of those corners there?
A. Wait, I see.
[fol. 86] Q. Is that the way those streets look?
A. Yes.
Q. Arthur Avenue and 183rd?
A. Yes.
Q. I show you the other pictures. Will you tell us whether or not those are the same streets where the accident occurred?
A. Yes.
Q. That is the way it looked on August 4, 1929?
A. Yes.

Mr. Chance: They are all the same.
Mr. Simon: Just a little different angles. We offer these in evidence. Any objection, Mr. Chance?
Mr. Chance: No.
(Photographs marked Exhibits P-6 and P-7.)

By Mr. Simon:

Q. Well, now, when you were on the corner of 183rd Street and Arthur Avenue what did you do?
A. Well, I wanted to cross the way.
Q. What?
A. I wanted to cross the way, to get to the other side, the other sidewalk.
Q. Well, now, did you look?
A. Certainly, I looked all over, you know, uptown, you know.
Q. What did you see?
A. I had to, naturally, because somebody walking——
Q. Just answer, Mr. Masci. What did you see when you looked?
A. Oh, I saw an automobile.

Q. Yes. And where was this automobile?

A. Well, it is one block, anyhow.

Q. Was it from your left or from your right?

A. On the left side.

Q. And about a block away?

A. Yes.

Q. Well, now, then what did you do?

A. Well, I continued to walk.

Q. All right. Now, did you look again to see this automobile?

A. Certainly.

Q. All right. And where was the automobile when you looked again?

A. I heard it blow.

[fol. 87] Q. He blew his horn, yes. Where was he, how far from you when you saw the man when he blew his horn?

A. Well, five or six foot, like that.

Q. I see. And then what happened?

A. Well, I continued to walk again, you know.

Q. Yes?

A. Because it is not far to go to the other side, see.

Q. Yes?

A. And I don't know—I fall down. Nothing else, I don't know anything else.

Q. From the time that he blew his horn till the time that you were hit——

A. Yes.

Q. —did you see the automobile stop or go slower or go the same speed?

A. No, he going that way (indicating).

Q. He went back and forth?

A. Yes, front back.

Q. Did he stop his car or slacken the speed of his car?

A. Well, no, he didn't stop, because if he stop he don't touch me.

Q. Did he blow his horn again?

A. No.

Q. After the first time?

A. No, no, no, just one time I heard.

Q. When you say he was going this way, show us with your hands again how he was going.

A. Well, that way, you know what I mean (indicating).

Q. Zigzagging?
A. Yes. Maybe he lost control——

Mr. Chance: I ask to strike that out.
The Court: Yes, strike it out.

By Mr. Simon:

Q. You see, Mr. Masci, you can't tell us what was in his mind. Now, you were taken to a hospital, were you?
A. I don't know.
Q. After the accident did you go to a hospital?
A. Yes, because he came in my family right away after that a couple of hours, you know.
[fol. 88] Q. You went to the hospital, Mr. Masci, huh? Just listen to me. They took you to a hospital, did they? The ambulance took you to the hospital?
A. After the accident?
Q. Yes.
A. Certainly.
Q. All right. Well, now, where were you hurt? What parts of your body were hurt?
A. The hospital——
Q. No, please! Where were you hurt? I don't care anything about the name of the hospital. What part of your body was hurt?
A. What do you mean?
Q. Was it your head or chest or leg or where?
A. Oh, on the chest and the leg.
Q. Anywhere else?
A. On the chest, because I remember the blood, you know. I had on a checked suit, you know. I don't use any more because of the blood.
Q. This head of yours, what did they do for your head? What did the doctor in the hospital do to your head?
A. Well, he put stitches in it.
Q. Anywhere else hurt on your head?
A. Yes, sure, yes.
Q. Where?
A. Here, right here (indicating).
Q. Where else on the head?
A. Yes.
Q. How about your mouth?

A. Well, the mouth, before, you know, I had my teeth here, all the teeth, you know.

Q. And the teeth came out?

A. Came out.

Q. All right. What else? Where else were you hurt?

A. Huh?

Q. Where else were you hurt?

A. The leg.

Q. The leg. All right. Talk loud, Mr. Masci.

A. The leg, yes.

Q. Well, now, who was your doctor?

A. Condreras.

Q. And were you in the Columbus Hospital on some big apparatus?

A. Sure.

[fol. 89] Q. All right. After you left the hospital who took care of you? Did the doctor take care of you?

A. No.

Q. Who took care of you?

A. My family, you know, the ambulance.

Q. But I mean you had a doctor, didn't you?

A. Certainly, sure, a doctor from my family. It is a long time I have a doctor.

Q. Yes. You were working for whom, then, before the accident?

A. For nobody—who I worked?

Q. Yes.

A. Oh, for——

Q. Mr. Weber?

A. Weber.

Q. The Fifth Avenue tailor?

A. Yes.

Q. How long had you been working there?

A. About seven years.

Q. You had been working about seven years for Mr. Weber?

A. Yes.

Q. About how much did you earn on the average per week?

A. Not by the week, by piece work.

Q. Well, how much would you earn, about, in a year, a salary of a year?

A. Well, you know, piece work, I make about two coats, sometime three coats.

Q. Yes?

A. And he give, you know, about twenty dollars up.

Q. Twenty dollars up?

A. Twenty-two, twenty-three dollars for one coat.

Q. Well, now, on the average, Mr. Masci, a year how much did you earn or a week or a month? Could you tell us?

A. Oh, a week, maybe sixty dollars, seventy dollars.

Q. Yes. All right. Well, now, since the accident have you done any work at all?

A. No, no.

Q. Why not?

A. I can't.

Q. Why can't you?

A. Because I can't stand up so long, because a tailor, you know, he got to stand up, you know.

[fol. 90] Q. I see. What happens if you stand up?

A. Huh?

Q. What happens if you stand up?

A. What happens?

Q. What happens to your leg if you stand a long time on your leg?

A. Well, both legs I got to stand up, you know, see.

Q. You may sit down, Mr. Masci. If you do stand up for any length of time does anything happen with your leg?

A. No, I can't.

Q. I see. Are you able to walk around all right, Mr. Masci?

A. No, not too much.

Q. Not too much? How much could you walk?

A. Well, one block, two blocks, then I got to sit, you know, because it hurts me.

Q. I see. Well, now, in this tailor business do you use a machine?

A. Certainly, sure.

Q. Why can't you use the machine?

A. No, I can't.

Q. Why?

A. I just try it a couple of months ago, see.

Q. Yes?
A. And I can't do.
Q. You can't do it?
A. No, because, you know, the foot, you know, I got to use the foot, you know.
Q. Got to use the foot?
A. It swells up right away.
Q. Swells right away?
A. Yes.
Q. Did you make or earn any money since the accident?
A. No.
Q. All right.
A. I don't earn no money.
Q. This accident happened August 4, 1929?
A. Yes.
Q. Do you know how much you paid the Columbus Hospital?
A. I don't keep it in my head. I got plenty of bills to give you, but I ain't got them in my——
Q. These bills were paid?
A. Certainly, sure.
Q. All right.
A. I pay every one.

[fol. 91] Mr. Chance: It doesn't make any difference whether they were paid or not. The doctor said they were reasonable.

A. I pay every one. Nobody I owe money to.

By Mr. Simon:

Q. All right, Mr. Masci. What about this mouth of yours? Have you got other teeth put in there since?
A. No. Take me off all the teeth here.
Q. How many were there?
A. All over, see, all over.
Q. I don't hear you?
A. Here.
Q. All right.
A. After I get sick, you know, see.

By the Court:

Q. Which direction were you walking?
A. Huh?

Q. Which direction were you walking? Were you walking north or south or east or west?

Mr. Simon: Show the Judge on the picture.
The Court: That won't help me.

By Mr. Simon:

Q. Will you tell the Judge from what corner to what corner?
A. Yes.

By the Court:

Q. Well, tell me. I can't understand that picture.

Mr. Simon: From what corner?

Q. What street were you walking on?
A. 183rd Street.
Q. 123rd Street?
A. 183rd Street.
Q. You were walking on 183rd Street?
A. Yes.
Q. Going to get a newspaper?
A. Yes, on Arthur Avenue.
Q. And when you got——
[fol. 92] A. On the corner of Arthur Avenue I went to cross ways.
Q. Did you cross Arthur Avenue?
A. No.
Q. Did you cross 183rd Street? Which street did you cross? Arthur Avenue or 183rd Street?
A. 183rd.
Q. You crossed that?

Mr. Simon: East to west. That is from the east corner to the west corner.

A. The west corner.

The Court: Crossed east to west?
Mr. Simon: To the west, yes. I think that is all. Take the witness.

Cross-examination.

By Mr. Chance:

Q. Referring to Exhibit P-6, which one of the streets on this is Arthur Avenue?

A. What do you mean?

Mr. Simon: Arthur Avenue, the street you were crossing.

The Court: No, he was crossing 183rd Street.

A. I was crossing 183rd Street.

By Mr. Chance:

Q. You were crossing 183rd Street?

A. Yes, sure.

Q. All right. Which is Arthur Avenue, anyway?

Mr. Simon: Show the lawyer.

Q. I want you to straighten me out. Which is Arthur Avenue on this picture?

A. That is LaFontaine Avenue, I think.

Q. Where is Arthur Avenue?

A. Arthur Avenue is over here.

Q. Arthur Avenue is the one on which the houses—the two-story buildings at the right of the picture face?

A. Plenty of store over there, plenty of store and plenty [fol. 93] of house, too, on the corner 183rd, see.

Q. Is this Arthur Avenue that runs right along in front of the buildings which you see on the right of the picture?

A. Yes, yes.

Q. And is it Arthur Avenue that continues there across by the——

A. Yes, that is it.

Q. —buildings on the left of the picture?

A. Yes.

Q. In other words, the street that runs almost a straight line across the picture from one side to the other, is Arthur Avenue?

A. Yes, yes.

Q. And Arthur Avenue is the one the automobile was on, is it?

A. (No answer.)

Q. Now, can you tell us where it was on this picture that you left the curb? Does that show?

A. What do you mean?

Q. You walked off the curb some place?

A. Yes, sure.

Q. Where is that on this picture?

A. I went across the way. I went across the way to the other side.

Q. I know, but where is the curb that you left? Did you walk off on this curb or off of this curb?

A. No, off this curb. I started here.

Mr. Simon: Do you want to mark that, Mr. Chance, so the jury will see?

Mr. Chance: It is pretty hard to know just where to mark.

Q. Just show us where you mean.

A. Well, I walked right here.

Q. I don't know. What street is it that is here right in front of this picture? What street is that?

A. I don't know what street it is.

Q. This one, the one down at the bottom.

A. 183rd.

Q. This is 183rd Street?

A. Certainly.

[fol. 94] Q. The place that you started from, then, is this curb where there is a bicycle tire, so you started to cross this way?

A. That is right.

The Court: Just mark that.

Mr. Simon: Put his name on it. The letter M indicates where Mr. Masci left the curb.

By Mr. Chance:

Q. Now, did this car come from your right or from your left?

A. On the left side.

Q. The left side. You didn't see this car was zigzagging before it was six feet away from you, did you?

A. Yes—what do you mean?

Q. I say, you didn't see the car make any zigzag movement until it was six feet away from you, did you?

A. Yes, that is all.

Q. That is all?

A. I see—I see the car from Arthur Avenue before crossed the way, you know, before they crossed. I look up and down to see some car.

Q. Well, did you see this car a block away?

A. Yes, just one block, a little more, too, maybe.

Q. Did you see it all the time from when you first saw it up until the time of the accident or did you look away from it?

A. After the accident——

Q. No, before the accident you looked up the street to your left?

A. Yes.

Q. And you saw this car?

A. Yes.

Q. Now, did you keep looking at it or did you look in the other direction after you saw it from a distance?

A. Well, when I had about half a block, when crossed the way, see, you know what I mean, I went to cross that way.

Q. No, you don't get my question. Sit down.

A. When he was half a block, you know, see, I look again.

Q. Oh, yes, I see.

[fol. 95] A. Naturally, because everybody got to look, because lots of automobiles in the streets.

Q. All right. Now, you saw him a block away?

A. Yes.

Q. Before you looked some other direction?

A. Yes.

Q. Then you looked again, and at that time he was about a half a block away; is that right?

A. No, no, half a block.

Q. No half a block?

A. A little less. A little less.

Q. A little less?

A. More or less, sure.

Q. How far did he travel while you were looking at him that time?

A. About forty or fifty feet, maybe.

Q. You watched him go forty or fifty feet?

A. Yes.

Q. And how far away from you was he then when you were looking at him that time? Was he forty feet away from you?

A. Yes, sure.

Q. About forty feet away from you?

A. Oh, yes, forty or fifty.

Q. Was he going slow then?

A. Well, not very slow and not very fast, either, but I thought I got time enough, you know.

Q. Well, of course, you thought you had time enough, but how far away from him were you when you quit looking at him that time?

A. About forty or fifty feet.

Q. About forty or fifty feet?

A. Oh, yes.

Q. Then when did you look at him again? How far away from you was he when you saw him next?

A. Well, the second time I see forty or fifty, I look.

Q. Yes, but the next time he was—you didn't watch him from then all the way up to when he hit you?

A. No, because I going straight, you know, I thought I could reach, you know.

Q. How far away was he when you saw him next?

A. Huh?

[fol. 96] Q. How far away from you was this automobile when you next saw it for the second time you have told us about?

A. Well, about forty-five feet, like that, you know.

Q. Well, now, from the time he was forty-five feet away up to the time of the accident did you keep on looking at him?

A. Now, you explain me, please. Explain me better.

Q. You say you saw him forty-five feet away?

A. What do you mean? That is the second time I am heard the blow, see.

Q. Forty-five——

A. Forty or fifty feet away, no four—no four feet, you know.

Q. Oh, no forty?

A. Forty, that is all.

Q. Now, what I want to know is, did you keep looking at him from the time that he was forty feet away until the

automobile and you were together? Do you get the question?

(The question was read by the reporter.)

A. Yes, yes, I look, certainly, I looked.

Q. Now, how far away from you was he when you heard the horn blow?

A. That is what I told you.

Q. Forty feet?

A. Yes.

Q. What is your age, Mr. Masci?

A. Huh?

Q. How old are you?

A. Who, me?

Q. Yes.

A. At that time—now I am seventy.

Q. You are seventy years now?

A. Yes, sir.

Mr. Chance: That is all.

Redirect examination.

By Mr. Simon:

Q. Mr. Masci, you were walking from the corner of Arthur Avenue and 183rd to the other corner; is that it?

A. Yes, the other corner.

Q. The opposite corner. And it was ten-thirty or eleven in the morning?

A. Yes, half-past ten or eleven.

Q. A clear day?

[fols. 97-99] By the Court:

Q. And, as I understand it, you were crossing Arthur Avenue and not 183rd Street?

Mr. Simon: Will your Honor permit us to ask the gentleman who is more familiar with these streets?

Mr. Chance: It is pretty hard to tell. They came together.

Mr. Simon: He was crossing Arthur Avenue.

The Court: Yes, because he couldn't cross 183rd Street from east to west.

Mr. Simon: That is right.

By Mr. Simon:

Q. You were on Arthur Avenue?
A. Yes.
Q. When you were crossing?
A. I crossed toward the other side.
Q. Yes, from the corner of Arthur Avenue to the other corner?
A. Yes.

Mr. Chance: I know that is so.

Q. Was there any traffic signal there, any policeman there?
A. No.
Q. Any dummy there, traffic signals?
A. No, sir.
Q. There are now?
A. Over there that is bad, that is very bad.

(Side bar discussion.)

By Mr. Chance:

Q. Were you on the north side or the south side of 183rd Street, do you know?
A. What do you mean?
Q. Before you started to cross Arthur Avenue, do you know whether you were on the north or the south side of 183rd Street?
A. I want to go the other side.

Mr. Chance: That is all.

* * * * * * *

[fol. 100] The plaintiff rested.

[fol. 101] DEFENDANT'S TESTIMONY

CHARLES W. YOUNG, sworn.

Direct examination.

By Mr. Chance:

Q. Mr. Young, you are the defendant, the man being sued in this case?
A. I am.

Q. Where do you live?

A. 27 DeMott Avenue, Clifton.

Q. On the 4th of August, 1929, did you own an automobile?

A. I did.

Q. And did you loan that car to Mr. Balbino?

A. Yes, sir.

Q. Did you know where he was going to take the car?

A. No, I didn't.

Q. Did you ever hear of any—prior to the institution of this suit did you ever hear of any statute of New York relating to the liability of an automobile owner for cars of his which were driven in New York?

Mr. Simon: I object to it as immaterial and irrelevant, as to whether or not he ever heard of any statute.

The Court: How is that relevant?

Mr. Chance: It is relevant upon the question of whether or not he agreed to be bound by any statute of New York.

The Court: I will sustain the objection and allow you an exception.

Mr. Chance: Note my exception.

By Mr. Chance:

Q. You were not present when the automobile was involved in the accident we are talking about?

A. No, sir.

Q. You don't know anything about the accident of your own knowledge?

A. No.

[fol. 102] Q. When the automobile was out on that day, the 4th of August, 1929, was it on the road for any purpose of yours?

A. No, it wasn't.

Q. Was Mr. Balbino in your employ?

A. No.

* * * * * * *

Cross-examination.

By Mr. Simon:

Q. Where did Mr. Balbino see you that day or the day that you arranged to let him take this car?

A. He made arrangements on Saturday afternoon.

Q. He had come over to your place of business on Saturday afternoon. Just what did he say to you?

A. He asked me if he could borrow this car for tomorrow; he wanted to go for a ride—he wanted to know if he could borrow the car for Sunday; he wanted to take his family for a ride.

Q. And you didn't ask him where he wanted to go?

A. No, I didn't ask him where he was going or anything.

[fol. 103] Q. And did you tell him when you wanted this car returned?

A. Well, I think I told him—no, I think he told me he would bring it back Monday morning.

Q. You had no objection, of course, to that, did you?

A. No.

Q. Though you say he didn't tell you where he was going and you didn't ask him?

A. No.

Q. All he asked was for the loan of the car for a day and you said that is all right, take it?

A. Yes.

By the Court:

Q. It was just as a favor; is that it?

A. Yes.

By Mr. Simon:

Q. Mr. Young, do you remember Mr. Irwin Simon coming over to see you?

A. Yes.

Q. Just answer yes or no.

A. Yes.

Q. And at that time—just answer this yes or no—did you or did you not tell him that Mr. Balbino told you he was going to Rye Beach, New York?

A. No, because I didn't know it.

Q. Well, how long ago was it when he came to see you?

A. I think it was some time in December.

Q. Of this last year?

A. Of 1929.

* * * * * * *

[fol. 104] LENA BALBINO, sworn.

Direct examination.

By Mr. Chance:

Q. Mrs. Balbino, you are the wife of the gentleman who was on the witness-stand yesterday?

A. Yes.

Q. You were in the automobile that we are talking about here when the accident happened, weren't you?

A. Yes, sir.

Q. Did you see Mr. Masci before the accident?

A. Well, I seen him about forty feet away.

By the Court:

Q. Speak out loud so they can hear you?

A. I seen him about forty feet away. He was just going to cross the curb.

By Mr. Chance:

Q. Now, where were you seated in the automobile?

A. I was sitting in the back.

Q. Talk up louder.

A. In the back of the car.

Q. And who else was in the car?

A. My mother and my father and the children.

[fol. 105] Q. They are quite elderly people, are they?

A. Yes, sir. My mother is sick.

Q. Your mother is sick?

A. Yes, sir.

Q. They too sick to come to court?

A. Yes, sir.

Q. Now, on this day as you were going along—do you know what street it was you were on just before the accident?

A. Well, I just don't know. I don't know nothing about New York, see.

Q. Well, anyhow, you were going along some street?

A. Arthur Avenue, I think.

Q. Before this accident?

A. Yes.

Q. And as you were going along there were you going fast or slow?

A. No, sir. About fifteen or twenty miles an hour.

Q. And did this gentleman blow his horn?

A. Yes, sir, he did.

Q. And you said you saw Mr. Masci about forty feet away?

A. Yes, sir.

Q. Well, now, tell the jury just how Mr. Masci acted from the time that you saw him forty feet away up until the time of the collision.

A. Well, he seen my husband blow the horn and he stopped.

Mr. Simon: I ask that it be stricken out.

A. And we were going further up and he stopped again. He didn't know which way he was going; he just got puzzled. He puzzled my husband, and he was going so nervous he fell on the car. My husband stopped and he fell on, right over the car, see; he just didn't know which way he was going.

Q. Well, now, what part of the car was it that the gentleman came in contact with?

A. The front, just the front.

Q. How far did the car go from the time that the man fell against it until it stopped?

A. Very slow it was going.

Q. Do you know how far it went before it stopped?

A. No, I don't just remember.

[fol. 106] Q. Was it a long distance or short?

A. I just don't remember, see.

Q. What is that?

A. I just don't remember that.

Q. When the accident happened you sort of forgot what else was going on?

A. I got nervous, that is what I did.

Q. Well, now, when was the act of the man in stopping with regard to the time the horn was blown? Was that after or before your husband blew the horn?

A. I don't remember.

Q. Your husband blew the horn, didn't he?

A. Yes, and then he stopped.

Q. It was then that the man stopped?

A. Yes, sir.

Q. And then what did your husband do?

A. Well, he stopped the car.

Q. And did Mr. Masci head toward the curb or toward the middle of the street right after your husband blew the horn?

A. He headed for the middle of the street.

Q. How far would you say Mr. Macsi went between the time that he started to make this back and forth movement that you are talking about, to the time the two cars came together, or the man and the car came together?

A. Well, he wasn't very far from the curb.

Q. How far would you say Mr. Masci was from the side of the street when you first noticed him?

A. Well, he was crossing, see.

Q. I know, but how far from the curb?

A. I couldn't tell you how far he was.

Q. Well, was he halfway across the street or quarter of the way? I don't mean in feet; I mean comparatively how much of the street had he gone over?

A. I just don't know.

Q. You don't know?

A. I don't know. I was in the back seat; I didn't see.

[fol. 107] Q. Just tell us what you do know about this thing. Tell us everything you saw?

A. Well, I seen the man. He just didn't know which way he wanted to go. First he went back, then he went forth. He seen the car coming. My husband blew the horn. He just didn't know which way. He was going back and forth. First he would go back and then he would go forth again. My husband blew the horn. He didn't just know which way he was going and he puzzled my husband up so that when my husband did stop, why, he fell right over the car.

Q. In other words, you say the car was stopped when the man ran into it?

A. Well, my husband just stopped when he just ran into him, see.

Mr. Chance: All right, cross examine.

Cross-examination.

By Mr. Simon:

Q. Why, Mrs. Balbino——

A. Yes.

Q. —you don't mean to say that the car was stopped when this accident happened?

A. When he bunked into him my husband stopped right away. He bunked into the car.

Q. Right after the accident your husband stopped?

A. No, he didn't right stopped just that minute when he fell right onto the car. He didn't know which way he was going, so my husband stopped and he went right into the car, that man did.

Q. Well, now, are you familiar with that neighborhood there?

A. No, I don't just know nothing about New York.

Q. Did you know the corner Mr. Masci got off from?

A. No.

Q. He was walking from one corner of the street to the other?

A. Yes, from this side to the other side.

[fol. 108] Q. And was the road clear?

A. I don't remember about the road.

Q. I mean, were there any cars coming in the opposite direction, did you know?

A. Sure, there was cars going forth and back.

Q. You were looking straight ahead, were you, right along?

A. Well, I don't know about that, because I don't remember if I was looking straight ahead.

Q. When you saw this gentleman forty feet away, of course, you were looking straight ahead, weren't you?

A. Well, I seen him—my husband was blowing the horn; that is why I seen him.

Q. So that when you saw him the first time he was forty feet away?

A. Yes.

Q. Did you look through the front of the car before that?

A. No, I didn't look in the front.

Q. So that the first time you looked on the front of the car was when this man was forty feet away from you?

A. Yes.

Q. Did you—at that time was he near the center of the road or where was he?

A. I just don't remember where he was. He was going across.

Q. Can you give us any idea whether he was near the curb or midway of the curb or past?

A. No, I don't remember about that. I just didn't take notice of it.

Q. What side of the street was your car being driven on?

A. On the right side.

Q. All right. Can you tell us, when this car was forty feet away from him, whether the gentleman was directly in front of your car?

A. Yes, sir.

Q. So that when this man was forty feet away, that gentleman was right in front, forty feet ahead?

A. Yes, yes.

Q. Then what did you see your husband do?

A. Well, my husband—he puzzled my husband, the man did; he didn't know which way he wanted to go.

[fol. 109] Q. All right. When did you see then Mr. Masci do, when he was forty feet in front of your car?

A. He stopped.

Q. This man stopped?

A. Yes.

Q. Now, when this man stopped——

A. Then he went and walked again.

Q. Just a minute, please. Mrs. Balbino, when this man stopped——

A. Yes.

Q. And your car was forty feet from him, what did your husband do?

A. My husband stopped, too.

Q. Oh, I see. So that when this man stopped when he was forty feet away from you, your husband stopped; is that right?

A. He blew the whistle and went ahead. He thought the man was going to stop——

Mr. Simon: I ask to have it stricken out, what he thought.

Q. You see, Mrs. Balbino, when you saw this man forty feet in front of your car, you say this man stopped; is that right?

A. Sure, he stopped.

Q. He stopped?

A. He seen the car coming.

Q. Was he stopped in the middle of the street?

A. Yes.

Q. What did your husband do?

A. Well, my husband was going on up.

Q. So while this man stopped your husband kept on going?

A. Yes, sure, because——

Q. Don't say because. That is so, isn't it? This man stopped and your husband kept on going?

A. Yes.

Q. Then what did the man do then?

A. I don't remember that.

Q. Well, was the man stopped when he was struck?

A. I don't remember that. I was in the back of the car. [fol. 110] Q. I see. How fast, Mrs. Balbino, would you say your car was traveling when Mr. Masci was struck?

A. My husband was going very slow up that street.

Q. About how fast?

A. I don't just know how fast. About fifteen miles.

Q. So that at the time Mr. Masci was struck the car in which your husband was driving was going about fifteen miles an hour?

A. Yes.

Q. Is that right?

A. Yes, sir.

Q. How fast was he going before that?

A. Fifteen to twenty; that is all.

Q. Fifteen to twenty. So that before that, at a distance of a block before that, the car was going fifteen to twenty miles an hour?

A. That is all.

Q. And at the time this man was struck it was going about fifteen miles an hour?

A. Yes, sir.

Q. I see. Now, your husband didn't stop his car from the time that this man was forty feet away from you till the time he was struck, did he?

A. I don't know about that.

Q. Well, would you remember whether he stopped?

A. No, I just don't remember about that.

Q. All you can tell us, then, is that when you saw this man forty feet from you——

A. Yes.

Q. —your husband was going about fifteen miles an hour at that time?

A. Yes.

Q. And at the time he struck him he was going about fifteen miles an hour?

A. Yes.

Q. And then he stopped right after that, didn't he?

A. Yes.

Q. And you say that part of the car struck this man.

A. The front.

Q. The front of the car?

A. Yes.

Q. Isn't it true, Mrs. Babilno, that Mr. Masci was more than halfway across the intersection when he was struck?

A. I don't know anything about that.

[fol. 111] Q. I see. Isn't it true that Mr. Masci became confused and zigzagged that way?

A. No.

Mr. Chance: I object to that. She doesn't know whether he became confused or not.

A. He puzzled my husband up, didn't know which way he was going.

Q. You say he puzzled your husband?

A. Yes, he did.

Q. So when he puzzled your husband——

A. Yes.

Q. —he went this way, did he?

A. No, my husband didn't go that way.

Q. Tell us how he went.

A. My husband stopped. He puzzled my husband and my husband stopped the car.

Q. Well, where was the—how far from your husband was he from this intersection——

A. I seen my husband stop. I wasn't looking at the man then.

Q. What we want to know is this: Your husband became puzzled, you say?

A. Yes, he puzzled my husband up.

Q. Yes. And how far away was he from your car when your husband was puzzled?

A. I don't think he was very far from the car.

Q. How far, about?

A. I don't know anything about that.

Mr. Chance: I object to that. She don't know anything about it.

Mr. Simon: Let her say so. It is cross examination; let her say so.

A. I don't know.

The Court: She said she can't tell.

A. I told him that he puzzled my husband up and I was in the back. I didn't see much.

By Mr. Simon:

Q. Well, do you know, Mrs. Balbino, where it was that your husband became puzzled? How far from this [fol. 112] man?

A. I just don't know anything about that.

Q. From the time that your husband became puzzled until the time that this man was struck how did your husband continue?

A. I don't remember that.

Q. You don't remember?

A. No.

By the Court:

Q. Well, how did he puzzle your husband? What did he do?

A. He was going forth and back. He didn't know which way he wanted to go, if he wanted to cross or didn't want to cross. He was going back and forth.

Q. How do you know that?

A. I seen the man and I didn't look any more.

Q. But you tell us you don't know what part of the road he was in?

A. He was going across, I am telling you.
Q. How far over was he?
A. Near halfway.
Q. Was he halfway across?
A. Going that way.
Q. Was he halfway across when you were forty feet away?
A. I don't know about that.
Q. Well, now, you don't remember. You say the man was puzzled and then you tell us you don't remember.
A. I seen my husband when he just got near the man, my husband got nervous, too.
Q. Well, you say the man was puzzled. What did he do that he was puzzled?
A. He didn't know which way he was going.
Q. What did he do that made you believe that?
A. He stopped and went forth. First he went forth and back again, see.
Q. He walked forward and back?
A. Yes.
Q. Well, how many times did he do that?
A. About three times.
Q. Three times he walked forward and back?
A. Yes.
[fol. 113] Q. And how far forward did he walk and how far backward did he walk?
A. I couldn't say.
Q. Now, you are telling us. Nobody else knows but you.
A. I know I seen the man, because my husband blew the horn.
Q. You saw the thing and know what it is about. Why don't you explain it to us?
A. He went five feet back and when he wanted to cross again, see, and he couldn't cross, because he seen the car, see.
Q. Well, was there other traffic?
A. There wasn't no other traffic.

The Court: All right.

By Mr. Simon:

Q. And when Mr. Masci was doing all this——
A. Yes?
Q. —what was your husband doing?

A. I don't know.
Q. Kept on going?
A. He was going slow.
Q. Kept on going slow?
A. Yes.
Q. While Mr. Masci was walking forward and backward that way, as you illustrate, three or four times, your husband kept on going, didn't he, at the rate of fifteen miles an hour?
A. He was going very slow, I am tell you.
Q. You say at the rate of fifteen miles an hour?
A. Very slow.
Q. Who else, Mrs. Balbino, was sitting in the front with your husband?
A. My father.
Q. Your father?
A. Yes.
Q. So just the two was in the front and you were in the rear with your mother?
A. Yes.
Q. And you saw this while looking——
A. From the back.
Q. You saw this in the back looking between your husband and your father?
A. Yes.
Q. This is the first time, is it not, that your husband ever drove a pleasure car?
A. Yes, sir.
[fol. 114] Q. I see. Your husband is here in court, that gentleman in the last row?
A. Yes, I see him.

Mr. Simon: That is all.

MICHAEL BALBINO, recalled.

Direct examination.

By Mr. Chance:

Q. Mr. Balbino, you were driving the automobile in question along Arthur Avenue, weren't you, before the accident?
A. Yes, sir. Yes, sir.

Q. When you came to the intersection there, where East 183rd Street and Crescent Avenue and East 184th Street all come together, did you see the plaintiff, Mr. Masci?

A. Yes, sir.

Q. Did you blow your horn?

A. Yes, sir.

Q. How far away from him were you when you blew the horn?

A. Practically about forty feet.

Q. Now, tell the Court and jury what he did, that is, what Mr. Masci did from the time you blew your horn until the time that Mr. Masci and the automobile were together?

A. I was going down Arthur Avenue and I saw him within forty feet, and I wanted to make a right-hand turn to hit the Boulevard to go down to Rye Beach, so he saw me. He simply walked straight ahead, didn't look either back or forth, and he just hesitated like a rubber ball on me, and he started over again, and he puzzled me again and I came in contact with him, and that is how it happened.

Q. Well, now, I am afraid we don't know just exactly what you mean by acting like a rubber ball. Just tell us what you mean by that. How did he manoeuvre that you say was like a rubber ball?

A. Well, I finally got close to him and he shifted from one side to the other. He would tremble, like, puzzled me, shivvered.

[fol. 115] Q. How far did he move any time that he was going like a rubber ball?

A. You mean back and forth?

Q. Yes.

A. Not very far. We will say about a foot—not so far.

Q. Looked one way——

A. Looked one way and then he went on in front of me again.

Q. Suppose you stand up and go through one of the rubber ball manoeuvres.

A. (The witness complied.)

Q. How did he go?

A. Well, we will say this is Arthur Avenue and 183rd Street. He was crossing the street and I am coming down blowing my horn, and he kept on walking, didn't look forth

or back if a car was coming or not, and I give him the horn and he got excited.

By the Court:

Q. What did he do? Explain it.

A. As I got close to him he went back and then back to me again and he went back and he hooked the headlights of my machine.

By Mr. Chance:

Q. All right, go back on the stand. Now, at the time that he got through these manoeuvres to the time he hooked your head lamps, how fast were you going then?

A. Fifteen.

Q. At the time of the actual point of contact, I mean.

A. You mean when I contacted with him?

Q. Yes.

A. After I hit him?

Q. When you hit him.

A. I stopped right there.

Q. And how fast had you been going as you were coming up the street there? For instance, when you blew your horn.

A. You mean before the accident?

Q. Yes.

A. Fifteen miles an hour.

[fol. 116] Q. And between the time that you were blowing the horn the first time you told us about and the time when the man was up against the front of your car there——

A. Yes?

Q. —had your speed been the same?

A. Why, it wasn't the same, but I had my foot off the gas and she was just rolling. Arthur Avenue is a sort of a little hill coming down.

Q. Well, when was it that you applied the brakes? Did you apply the brakes before you hit him or——

A. Well, I was going slow. I had my foot on the brake, but I didn't have it down full.

Q. You say he ran into you or you ran into him?

A. Well, we both contacted.

Q. I see. And how far did you go ahead from the moment of contact till when you were actually at a stop?

A. You mean after I hit him?

Q. Yes.

A. I stopped and picked him up.

Q. How far was he away from the curb?

A. Why, I figure about not quite halfways.

Q. Do you know whether at the time he happened to get against the car that he was faced back toward the curb he had started from or faced the other way?

A. No, facing going across the street, crossing Arthur Avenue.

Q. Well, these manœuvres that you have told us about were out there in the middle of the street, then; is that right?

A. (No answer.)

Mr. Chance: That is all. Cross examine.

The Court: We will take a recess until 1:30.

(Recess to 1:30 o'clock p. m.)

Afternoon Session, 1:30 P. M.

MICHAEL BALBINO, resumed.

Cross examination.

By Mr. Simon:

Q. Mr. Balbino, it was testified this morning that Mrs. Balbino, your wife, and mother-in-law were in the rear of [fol. 117] car; is that right?

A. Yes, sir.

Q. Wasn't there anyone else in the rear of the car besides your wife and mother-in-law?

A. My kids.

Q. Your kids?

A. And my brother-in-law.

Q. And your brother-in-law. So that there is how many in the rear of the car?

A. Five.

Q. Five. Now, did I understand you to say this morning on direct examination by your counsel that you were going to make a right turn?

A. Yes, sir.

Q. What is that?

A. Yes, sir.

Q. A turn into what street?

A. 183rd Street.

Q. So it was your intention at that corner where the accident happened to make a right turn to 183rd Street; that is right?

A. Yes, sir.

Q. Well, now, are you sure about that, that you were going to make a turn?

A. Yes, sir.

Q. And why?

Mr. Chance: I object to it as immaterial—why.

Mr. Simon: All right, withdraw that.

By Mr. Simon:

Q. You say, now, that you were going to make a right turn?

A. Yes.

Q. You are sure about that?

A. Yes.

Q. You remember, do you not, in my offices giving some testimony and Mr. Shaw, that gentleman, the stenographer here now, was the gentleman who took the testimony, this same gentleman?

A. I don't recall.

Q. Well, do you remember you were asked some questions and some answers were given? Is that right?

A. Yes.

Q. You were asked at that time—the question was. "You were making a turn east?" Your answer, "No, I was going to keep on. I was going on Arthur Avenue." Which is correct?

A. I don't recall that.

[fol. 118] Q. That you were going to keep on or you were going to turn?

A. I don't recall that.

Q. You don't recall what?

A. I was making a right-hand turn, hitting for the Boulevard.

Q. Well, now, when you testified—when you were asked this question in March of last year, almost a year ago, and your answer was, "No, I was going to keep on Arthur Avenue," was that answer at that time correct or not?

Mr. Chance: I don't know what this testimony is.

A. No, I don't remember.

Mr. Chance: What is this?

Q. You were asked that question, weren't you, in my office?

A. Yes, sir.

Q. You don't remember this answer?

A. I remember making a right-hand turn on 183rd Street on Arthur Avenue.

Q. Do you now say that you didn't say, "I was going to keep on Arthur Avenue"?

A. I don't recall it.

Mr. Chance: Well, I object to the use of some examination which we are not given any particulars of as to what it is.

Mr. Simon: Testimony taken in my offices.

Mr. Chance: In what case?

Mr. Simon: That wouldn't make a bit of difference. His testimony in the case of Masci against Balbino where he was a defendant.

By Mr. Simon:

Q. Now, where did you first see this man? How far was he from you?

A. Within forty feet.

Q. And on what side of the road were you then?

A. Right-hand side of the road.

Q. And when he was forty feet from you on the right-hand side of the road was he directly in front of your car [fol. 119] or where?

A. No, sir.

Q. Where was he then?

A. He was just about to cross off the pavement.

Q. I see. So that the first time that you saw this man was just about off the pavement?

A. Yes, sir.

Q. How many feet would you say he was from the curb then?

A. About four feet.

Q. Four feet?

A. Yes, sir.

Q. Are you sure about that?

A. Well, I am just guessing at it, but two years ago I can't remember all them things.

Q. You can't remember?

A. No, sir.

Q. Isn't your memory clear now where you first saw this man when you were forty feet from him?

A. I told you I saw him forty feet.

Q. Yes.

A. Within that spot.

Q. And where was he then?

A. Three foot off the corner.

Q. Are you sure about that?

A. As I got closer to him he was walking.

Q. And when you first saw him he was just three feet off his corner?

A. Three foot off the pavement.

Q. He wasn't in the middle of the crossing?

A. No, sir.

Q. Then you were asked this question: "And was this man at the crossing?" Answer, "He was halfway, yes." What did you mean then when you said a year ago that he was halfway across?

A. Halfway across the Street?

Q. Yes. Is that answer right or is your answer to-day right?

A. I don't remember.

Q. You don't remember?

A. No, sir.

Q. That is your answer to-day? You mean you don't remember whether he was three feet off the curb or whether he was halfway across? You don't remember?

A. No, sir.

[fol. 120] Q. Well, now, are you sure now, then, that you were forty feet away when you first saw him?

A. Yes, sir.

Q. Well, now, that road is about how wide, Arthur Avenue?

A. Well, it is a pretty wide road.

Q. Could you give us——

A. Enough for about three machines to go through.

Q. And it was a clear day, was it?

A. A clear day.

Q. So there was nothing to prevent you from looking ahead, was there?

A. I did look ahead. I did.

Q. Yes. Well, could you tell this Court why it was that you didn't see this man until you were forty feet away from him on a bright, clear day, on a broad avenue?

A. I saw the man within forty feet, I told you, and as I was riding down he got closer to me.

Q. Now, tell us, Mr. Balbino, why it was, if it was a clear day and a broad avenue, why you didn't see this man before he was forty feet in front of you.

A. I didn't hit him within forty feet.

Q. What is that?

A. I hit him when I got close to him.

Q. Mr. Balbino, maybe I don't make myself clear. You said the first time you saw this man was forty feet away.

A. Forty feet.

Q. And it was a clear day?

A. That is, before I got to that corner.

Q. Yes. Well, tell us why didn't you see this man, then, before you were forty feet away from him. Why didn't you see him when he was eighty feet or a hundred?

A. From that corner to 183rd Street is a triangular corner.

Q. Yes?

A. It is less than forty feet.

Q. You mean from Arthur Avenue where you were traveling on to the next corner where you were coming from is only forty feet?

[fol. 121] A. Have you got the diagram there?

Q. This doesn't show all of Arthur Avenue?

Mr. Chance: What is that? The picture?

Mr. Simon: Yes.

Q. You haven't got the full particulars on Arthur Avenue.

Q. Do you mean to say, then, that the first time that you saw this man was forty feet away, and because you couldn't see him before that——

A. I saw him first I was going down, as I was riding down, as he got off the pavement.

Q. All right, forty feet away. But why didn't you see him when you were a hundred feet away?

A. A hundred feet?

Q. Yes.

A. I am telling you from corner to corner on 183rd Street it is not forty feet; it is a triangular corner.

Q. You were riding on Arthur Avenue, weren't you?

A. Yes, I was riding on Arthur Avenue.

Q. Yes, and you were going what direction?

A. East.

Q. East?

A. East, for the Boulevard.

Q. Isn't there a very long block to where you get to 183rd Street and Arthur Avenue?

A. It is not very long.

Q. Not very long?

A. It is not very long, because there is another street in between that and 183rd Street.

Q. Well, how far is that away from 183rd Street?

A. Well, that is——

Q. When have you been there the last time?

A. When I have been on that corner the last time?

Q. Yes, yes.

A. That is the first time I have been there with that car.

Q. But have you been there since the accident?

A. Have I been there since the accident?

[fol. 122] Q. Yes.

A. Why, I was down there with Mr. Young to show him where the accident happened.

Q. Don't you know that is a very long block until you get to 183rd Street and Arthur Avenue?

A. Before 183rd Street?

Q. Before you get to the corner it is a very long block, isn't it?

A. There is several houses there and there is lots of streets cut into triangles.

Q. Before you get to the corner where the accident happened?

A. Arthur Avenue is a long street, yes, it is.

Q. Yes. So that you were a good distance away from 183rd Street at one time, weren't you, on Arthur Avenue?

A. Right up on the next corner.

Q. Well, now, did you see him at that time?

A. Did I see him at that time?

Q. Yes.

A. No.

Q. So you didn't see him until he was——

A. Until I got close to him.

Q. Forty feet away, and at that time you say he was how far?

A. When I hit him?

Q. Yes.

A. Not very far.

Q. How far?

A. Within about six or seven feet.

Q. From the curb; is that right? Is that right?

A. I was close to him. I was close to him with my machine at that time. Not from the curb.

Q. How far was he from the pavement when you struck the man?

A. I told you about three foot.

Q. Three foot. Three foot is where you first saw him, you said.

A. That is where I first saw him.

Q. How far was he when you struck the man?

A. How far was the man out?

Q. Yes.

A. Well, figure about four or five feet.

Q. All right. Now, you are sure about that, aren't you? You are sure about that?

A. As far as I could remember.

Q. Isn't your memory clear to-day?

A. I don't know.

[fol. 123] Q. You don't know? Do you remember being asked this question: "How far from him were you when you first saw this man?" Answer, "Twenty feet."

A. I told you—twenty feet?

Q. Yes. Did you say that?

A. When I first saw that man?

Q. Yes.

A. Twenty feet?

Q. Yes.

A. Then I wasn't a block away, as you say.

Q. No, Mr. Balbino, I am only asking you which is true, that you were twenty feet——

A. I am telling you the way it happened, Mr. Simon.

Q. How close do you say you were now to the man? Twenty feet or forty feet?

A. Do you mean the time that I hit this man?

By the Court:

Q. No, when you first saw him.
A. When I first saw him was in forty feet.
Q. Not twenty feet?
A. No, sir, as far as I could remember.

By Mr. Simon:

Q. Well, then, this answer isn't correct when you said the first time you saw the man was twenty feet from you?
A. No—well, I wouldn't say it is correct or it is not correct.
Q. And when you were asked this question, was the man at the crossing, you said he was halfway across. That is not true, then, is it?
A. Well, anything like that you couldn't really say if he was half across or started from the pavement about a month later. I couldn't remember all them things.
Q. If you can't remember whether he was half-way across or three or four feet across, then why do you want to tell us, then, how far he was?
A. He wasn't halfway across, because Arthur Avenue is a wide block.
[fol. 124] Q. If he wasn't halfway across, why did you say so in March of last year, that he was halfway across?
A. (No answer.)
Q. Did you swerve your car at all before you struck this man?
A. What was that?
Q. Did you swerve your car at all before you struck this man?
A. What do you mean by swerving?
Q. You don't understand what I mean by swerve?
A. Give it to me clear, please.
Q. All right. Did you turn your car left or right or go straight?
A. I went straight ahead.
Q. Then, you were asked this question: "What did you do as you got near this man, if anything"——
A. I blew my horn.
Q. No, you were asked that and you said, "What did I do? I blew my horn and the man puzzled me and I tried

to avoid it on my left when the right side of my car got him and knocked him down.

"Q. You mean you swerved your car to the left?"

"A. Yes."

Now, is it true that you swerved your car or you went straight?

A. I was going straight ahead.

Q. Well, then, you didn't swerve your car?

A. I didn't zigzag my car at all.

Q. You didn't turn left, then, did you?

A. I didn't turn left or right. I hit the man and I stopped and picked him up.

Q. So that answer is wrong, too, when it says you swerved left and then hit this man? That is not correct, is it?

A. I am not going to say if it is correct or not.

Q. Well, if it is not correct—if you don't remember, you tell us, rather than answer, you say you don't remember.

A. It is quite a ways back. I couldn't remember them things.

Q. Were the brakes in good condition?

A. Yes, sir.

[fol. 125] Q. You were asked this question: "Were the brakes of this car in good condition?

A. I didn't test them out that day.

"Q. You didn't test them? A. I didn't test them. He just gave me the car like that."

A. I am not a mechanic, so I didn't test the brakes.

Q. Well, were they in good condition?

A. They were in good condition.

Q. "Q. Then, you say, you didn't test the brakes of this car before the accident?

A. No, sir.

"Q. So you don't know whether or not they were in good condition or not? A. No."

That is correct, that you didn't know whether they were in good condition?

A. I didn't examine the brakes; I simply took the car and went that morning.

Q. Didn't you at any time apply the brakes, then, before the accident?

A. Before the accident?

Q. Yes.

A. Yes.

Q. Then you ought to have known whether they were in good condition?

A. Well, they were in good condition.

Q. Then, why did you say, then, when you were asked that question whether they were in good condition, you said you didn't know?

A. They were good enough to stop on the corner every time I tried them.

Q. Now, where was this man lying when you stopped your car?

A. You mean laying after I hit him?

Q. Yes.

A. You mean after the accident?

Q. Yes.

A. Well, I was inside, and I couldn't tell you which side of the road he was laying.

Q. You got out of your car?

A. I got out of my car, yes.

Q. Where was he lying?

A. Why, he was laying right in the street.

Q. Out in the street. Well, in front of the car?

[fol. 126] A. In front of the car, of course.

Q. So you didn't have to back up your car, then, did you?

A. Did I have to back up my car?

Q. Yes.

A. I stopped—did I have to back up my car?

Q. Did you, when he was laying there in front of the car?

A. Let's see. I think I did.

Q. You aren't sure about that, either, are you?

A. If I backed up my car or not?

Q. Yes. You don't know that?

A. Well, I don't remember that.

Q. All right. How fast were you traveling when you blew your horn fifty feet before that?

A. Fifteen miles an hour.

Q. How fast were you traveling at the time that this man was struck?

A. Fifteen miles an hour.

Q. How fast were you traveling before that?

A. Before I hit this man?

Q. Before, yes.

A. The same rate.

Q. So that from the first time—withdraw that. How fast were you traveling when you got on Arthur Avenue, just a block before that?

A. Before the accident?

Q. Yes.

A. The same rate.

Q. So that from the time you go on Arthur Avenue to the time you blew your horn——

A. Yes.

Q. —and the time this man was struck, you kept on going fifteen miles an hour?

A. Yes.

Q. So you didn't slacken your speed before this man was struck?

A. No.

Q. And you didn't stop your car before this man was struck?

A. Of course, I didn't; I went right ahead.

Q. Well, did this man appear to you to be puzzled?

A. Yes, sir.

Q. And when he was forty feet away from you did you realize that he was puzzled?

A. Well, no, not when I was forty feet away from him. [fol.127] When I got close to him, within six feet, six or seven feet, that is when the old gentleman puzzled me.

Q. When he was six or seven feet away from you you were puzzled?

A. Yes, sir.

Q. Then what did you do?

A. I blew my horn more than twice and he just hooked my headlights and down he went.

Q. Yes, and where, then—now, for the last time, where was he in the road when he was struck?

A. You mean where he was lying?

Q. Yes.

A. Why, right in the center of the road.

Q. In the center of the road?

A. I mean in the center of the street. Of course, it wouldn't be near the curb where I struck him. I couldn't move the car over or I couldn't move him over.

Q. Mr. Balbino, where was it in relation to the road that you struck this man? Near the curb or in the center or on your left side of the road?

A. You mean when I struck him?

Q. Yes.

A. Well, I don't remember if it was the center or what. I don't remember.

Q. Why don't you?

By the Court:

Q. Where was your car?

A. My car was on the right-hand side, sir.

Q. That is what he is asking you. He is asking you where your car was when the accident took place. Was your car near the curb?

A. Well, it wasn't quite near the curb. I should judge about six feet from the curb.

Q. Six feet from the curb?

A. Yes

By Mr. Simon:

Q. How wide would you say Arthur Avenue is, about?

A. Well, enough for about three cars to go through or more.

[fol. 128] Q. What would that be? About how wide?

A. Well, say about forty-five or fifty feet.

Q. About forty-five to fifty feet, the whole width of the road?

A. I guess so.

Q. And you were about five or six feet from the right curb when this man was struck; is that right? You were asked this question: "Where was he struck on the street?" Your answer is, "He was struck right in the middle of the street.

"Q. In the middle of what street? A. In the middle of Arthur Avenue."

Is that true, that he was struck in the middle of the street, or right near the right curb?

Mr. Chance: Now, I object to this reading of certain document that is not in evidence, some document concerning the authenticity of which there is no proof, concerning which there is no way of knowing whether it was a judicial proceeding or some kind of a private conference, or just what kind of a performance this was, or whether it was under oath or not.

The Court: I will overrule the objection and allow you an exception.

Mr. Chance: Exception.

By Mr. Simon:

Q. Which is true? When you stated in March of last year that the man was struck in the middle of the road or when you now state that the man was struck five or six feet from the right curb?

A. I couldn't——

Mr. Chance: I object to that question.

A. I couldn't remember.

Mr. Chance: —because it contains an unwarranted assumption of fact, concerning which there is no evidence that he did say such a thing last March.

Mr. Simon: I will put it to him this way:

[fol. 129] Q. Do you remember being in the offices last March, March 29, 1930, and Mr. Shaw was there taking testimony, this gentleman?

A. Yes, sir. I don't remember him, though.

Q. I beg your pardon?

A. I said I don't recall him.

Q. You remember you were asked this question: "Where was he struck on the street?" and your answer was, "He was struck in the middle of the street"? Is that the correct answer or not?

A. No, sir.

Q. That is not correct? What is correct, then?

A. Within six or seven feet from the curb.

Q. So that—and then you were asked, "In the middle of what street?" and your answer was, "In the middle of Arthur Avenue." That is not correct?

Mr. Chance: I object.

A. You couldn't figure twenty feet the middle of Arthur Avenue, though. It is about sixty feet in width.

Q. What a minute.

Mr. Chance: I object because there is no evidence that he said anything of the kind.

The Court: I will permit it.

Mr. Chance: Where is the evidence?

The Court: Six or seven feet from the curb.

Mr. Chance: No, the other part there, that—as to what he said last March, whatever the date was.

By Mr. Simon:

Q. You were asked last March, "Where was he struck on the street?" Did you answer then, "He was struck right in the middle of the street"? Is that correct or not?

A. I don't remember.

[fol. 130] Mr. Chance: The point I object to is that statement that you were asked last March. There is no evidence that he was asked anything of the kind.

By Mr. Simon:

Q. Well, do you remember being asked this question last March in my office and Mr. Shaw was taking the testimony, "Where was he struck on the street"? Do you remember being asked that question?

A. You asked me a question like that, yes. Yes, you did.

Q. All right. Do you remember answering it this way: "He was struck right in the middle of the street"?

A. I don't recall it.

Q. You don't remember that?

A. No, sir.

Q. Do you also remember then being asked, "In the middle of what street?" and your answer was, "In the middle of Arthur Avenue"?

A. I didn't measure that street.

Mr. Chance: I make the same objection. There is no evidence——

Q. Were you asked that question, "In the middle of what street?" Do you remember being asked that question?

A. You asked me what you did, yes.

Q. All right. Do you remember answering, "In the middle of Arthur Avenue"?

A. I don't recall that.

Q. You don't recall that?

A. I didn't have a ruler and measure it.

Q. What is that?

A. I didn't measure if it was the center or the—I told you within six feet from the curb, that is where I struck the old man.

Q. I see. Well, now, is your memory any better to-day than it was more than a year ago, about a year ago?

[fol. 131] Mr. Chance: I object. It calls for a conclusion.

Mr. Simon: He ought to know.

The Court: I will permit it.

Q. Is your memory any clearer to-day than it was a year ago?

A. Well, I wouldn't exactly say yes.

Q. Isn't it true that your memory was better almost a year ago than what it is to-day?

Mr. Chance: I object to it as calling for a conclusion.

Mr. Simon: He could tell us.

A. I don't know.

Q. You don't know. Well, now, had you ever driven a pleasure car before?

A. No, sir.

Q. Before this car?

A. No, sir.

Q. So that this was the first time that you ever drove——

A. A pleasure car, yes.

Q. —a pleasure car in your life?

A. Yes.

By the Court:

Q. Did you have a license to drive?

A. Yes, your Honor.

Q. How long had you had it?

A. Four years.

By Mr. Simon:

Q. You drove just trucks before that?

A. Trucks, yes, sir.

Q. How far would you say, Mr. Balbino, you were when you first realized you were going to hit this man?
A. I told you within forty feet.

(The question was read by the reporter.)

A. You mean when I was about to hit this old man?
Q. Yes.
A. I told you within six feet.
Q. And you were asked this question, and do you remember you were asked it, "How far were you from him [fols. 132-138] when you first realized you were going to hit him?" and your answer was, "Twenty feet"? Did you say that or didn't you say it?
A. I don't remember that.
Q. You don't remember. Your memory isn't quite clear to-day, then, at all about this accident, is it, Mr. Balbino?
A. (No answer.)
Q. So that from the time that you got on Arthur Avenue you were going about fifteen miles an hour?

The Court: Yes, he said that.

Q. Up to the time you struck the man you didn't slacken speed or stop?

The Court: Don't let us rehash it.
Mr. Simon: I think that is all.
Mr. Chance: Now I would like to call Mr. Young, this young man, the stenographer.
Mr. Simon: You mean Mr. Shaw?
Mr. Chance: Yes.

* * * * * * *

[fol. 139] The defendant rested.

[fol. 140] PLAINTIFF'S TESTIMONY IN REBUTTAL

IRVIN H. SIMON, sworn.

Direct examination.

By Mr. Simon:

Q. Mr. Simon, you are a clerk in my office, are you not?
A. I am.

Q. And my brother?
A. That is right.
Q. Did you, at my request, go to see Mr. Charles Young of Passaic, the defendant in this case?
A. I did.
Q. Do you recall about when it was?
A. The latter part of 1929.
Q. And at that time did you have a conversation with him as to whether or not he knew where Mr. Balbino was going to go with his car the day of August 4, 1929?
A. I did.
Q. Did he say to you that——

Mr. Chance: I object to that leading question.
Mr. Simon: That is right.

By Mr. Simon:

Q. What did you—what did he say to you as to where his car was being driven?

Mr. Chance: I object to it as irrelevant and immaterial, as to what he said about it.
The Court: What difference would it make?
Mr. Simon: What difference would it make? None, except on cross examination the defendant said a certain thing. I don't think it makes any difference. I don't care whether he went to Europe with it, as long as he had permission.
Mr. Chance: I object to it because it is immaterial.
The Court: Well, you brought that up yesterday, and I was wondering why.
Mr. Simon: Except they allege as a special defense——
[fol. 141] The Court: In other words, the testimony in this case is that this man gave him permission to use his car.
Mr. Simon: They allege in a special defense that they didn't know he was going to New York. That is the special defense, and because of that I just wanted to put Mr. Simon on in rebuttal to prove that he did know. But if your Honor feels it doesn't make any difference, although I think it does, because he gave him general permission.
The Court: You want to show that he knew he was going to New York?

Mr. Simon: Yes, that is the only purpose. I am afraid this may be a constitutional question that may be involved in the future, and I just want to lay a real foundation.

The Court: I suppose it is permissible for the purpose of contradicting a witness.

Mr. Simon: That is it, yes. They allege that as a special defense, and I think we ought to be permitted to put it in.

The Court: I will permit it and allow you an exception.

Mr. Chance: My objection is that it is immaterial and it makes no difference.

By Mr. Simon:

Q. What did Mr. Young say to you?

Mr. Chance: Exception.

The Court: Is that all Mr. Balbino said, he didn't tell him he was going to Rye Beach?

Mr. Simon: Mr. Young also stated that, if your Honor please.

The Court: And then Mr. Balbino being called by you said he didn't tell him he was going to Rye Beach. He was asked a question, "Didn't you tell Mr. Simon," and he said [fol. 142] no, he did not. Now, the question is presented now to contradict that statement.

Mr. Simon: That is it.

Mr. Chance: Yes, and my objection is it is immaterial whether he did tell him in the first place, whether he told him that.

The Court: Well, if it was immaterial I don't know why you asked it, then.

Mr. Chance: I didn't ask him; he asked it.

The Court: You asked it of the defendant himself when you called him. You called Mr. Young.

Mr. Chance: Yes, I called Mr. Young.

The Court: You asked him what he said and you asked him what he said about loaning the car and so forth.

Mr. Chance: I wanted to show that there was a bailment.

The Court: Yes, you wanted to show that there was a bailment and everything in connection with it, and being on direct examination he made the statement, and he was asked on cross examination if he was told that the man was going to take it to Rye Beach and he said no, he didn't

tell him where he was going. Now, this is to contradict that. I will permit it and allow you an exception.

By Mr. Simon:

Q. Where did he say the car was being driven?
A. Mr. Young told me that he was told by Mr. Balbino that the car was going to be driven by Mr. Balbino with some of his relations to Rye Beach, New York.

Mr. Simon: That is all.

[fol. 143] Cross examination.

By Mr. Chance:

Q. Did you go to see Mr. Young after the suit had been started?
A. That is right.
Q. Who sent you there? Your brother?
A. Dr. Aaron Simon.
Q. Didn't say anything to you about the ethics of interviewing the other side?

Mr. Simon: I object to it.

Q. Whether he had a lawyer, did he?

Mr. Simon: I object to it as immaterial and irrelevant.
The Court: Sustain it.
Mr. Chance: All right, that is all.

Both sides rested.

[fol. 144] Motion for Direction of Verdict

Mr. Chance: I move at this time for a directed verdict upon the ground that it appears in the case that Mr. Balbino had this car under a bailment made in New Jersey, and that at the time of operating the car when the accident occurred he was not the agent or servant in any sense of Mr. Young.

* * * * * * *

Fifth, because it appears from the evidence that Mr. Young was not in New York; that he made a bailment of

his car in New Jersey; that the driver at the time of the accident was not Mr. Young's agent, and so to apply the law of New York as to make Mr. Young responsible for anything that Mr. Balbino did would deprive Mr. Young of his property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the [fol. 145] United States, and would also deprive him of his liberty to contract and make contracts, in violation of the Fourteenth Amendment.

Sixth, upon the ground that it appears in this case that the plaintiff was guilty of contributory negligence and that he did not exercise reasonable observation, reasonable judgment, as to how and when to cross the street, in view of the approach of an automobile which he had seen approaching.

The Court: For the reasons already given by me on all of the objections made at this time on the request for a direction of a verdict, excepting the last ground, I will deny them and allow you an exception.

Mr. Chance: Yes. Exception.

* * * * * * *

(The Court charged the jury as follows:)

COURT'S CHARGE TO THE JURY

MACKAY, J.:

Members of the Jury:

The plaintiff, Anthony Masci, is seeking to recover damages from Charles Young, the defendant, by reason of injuries sustained by the plaintiff in an automobile accident happening on August 4, 1929, about ten-thirty or eleven o'clock on a Sunday morning. The plaintiff, as I recall it, said that he left his home on this particular morning and [fol. 146] was walking along the street toward the intersection of East 183rd Street and Arthur Avenue; that when he reached that point he intended to cross Arthur Avenue, going from east to west. He said he looked in different directions and he saw a car to the left about a block away; that he started to cross, and that when the driver of that car, Mr. Balbino, was a short distance away—you will re-

member just what that distance was—Balbino blew a horn, and that he was struck by that automobile about the middle or a little past the middle or center of the roadway, causing the injuries complained of.

The driver of the car, Balbino, said that he was traveling along Arthur Avenue at a speed of about fifteen miles an hour; that he kept up that speed and when about forty feet from where the plaintiff intended to cross; he saw the plaintiff in the roadway near the curb; that he blew his horn and that the plaintiff moved backward and forward, which caused him to be undecided as to just what he should do to avoid an accident. There is some testimony that was read to you that was taken in Mr. Simon's office, in which he said he swerved to the left to get out of the way of the plaintiff, but that the plaintiff came into his car and was injured.

Now, of course, the testimony is somewhat conflicting on the question of speed. First, I think it was fifteen to twenty miles an hour and then fifteen miles an hour, and I think the plaintiff himself said that the car which Balbino was driving was not going too fast and was not going too slow, or was not going fast or was not going slow, or something to that effect. In any event, the claim of the plaintiff is that the driver of this car was negligent and that his negligence was the cause of the accident and injuries. That is the plaintiff's claim.

The defendant, of course, claims that he simply loaned his car to Mr. Balbino. In fact, it is admitted in this case, [fol. 147] I think, that the car was loaned. There is some question as to whether or not the driver of the car, Balbino, who borrowed it, said he was going to Rye Beach or going to some beach or just going to borrow the car. In any event, as I understand it, it is admitted that he borrowed the car and was simply a borrower, so that what we call in law the relation of bailor and bailee existed between those parties; in other words, Young, the defendant, was the bailor and Balbino, the driver of the car, who borrowed it, was the bailee or borrower.

Now, the accident happened in New York City, and the plaintiff claims that because of the statute in New York, a statute law, the bailor—meaning Mr. Young, the defendant—is liable in this case if there was any negligence on the part of Balbino which was the proximate cause of the

accident and injuries, because this statute which was read to you creates a liability against the owner or bailor. And relying upon that New York law, the New York law has been offered in evidence in this case; that is, Section 59 of the law, or a part of Section 59. The defendant has also offered in evidence the remaining portion of Section 59 of the law, and subsection 10 of Section 70 of the law, relating to penalties and so forth.

Now, of course, in this case I have not given you all the facts in detail. There was testimony that the accident happened in the center of the street. There was testimony that the accident happened about six or seven feet out from the curb. There was testimony that the street may have been forty feet wide or forty-five feet wide, or it may have been narrower or it may have been wider. You must determine from all of the evidence as you have it before you just exactly what the truth of the matter is.

The burden of proof in this case is upon the plaintiff to [fol. 148] satisfy you by a fair preponderance of the testimony that the driver of this car, Balbino, was negligent and that his negligence was the proximate cause of the accident and injuries, and that, as you know, means by the greater and weightier evidence; it means by the more convincing testimony.

If you find on the question of negligence that the testimony is evenly balanced or that it preponderates in favor of the defendant, your verdict must be in favor of the defendant and against the plaintiff, no cause for action.

The defendant says, further, that the plaintiff in this case, Mr. Masci, was guilty of contributory negligence. First let me say for your information that our Courts have defined negligence to be the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a prudent and reasonable man would not do. And, as I told you, the burden of proving negligence by the fair preponderance of the testimony is upon the plaintiff.

Now, the defendant in this case says that the plaintiff was guilty of contributory negligence.

The negligence charged against the defendant by the plaintiff is that the driver of this car did not operate and

control his car in a reasonable and proper manner, with due care, thereby causing the accident in question.

Now, as I said, the defendant claims that the plaintiff was guilty of contributory negligence in that he did not use such care as a reasonably prudent person should use under the circumstances and conditions existing at that particular time, in that he saw this car and did not use that care which he was required to use to avoid being struck by it.

If you find that the plaintiff was guilty of any act of negligence which directly contributed to his injury, or was [fol. 149] guilty of any lack of ordinary care on his part, whether the act be an active one or an omission to do what he ought to have done under the circumstances, and such lack of care, act, or omission contributed to the accident, and without which the accident would not have happened, then you cannot render a verdict for the plaintiff, but your verdict must be in favor of the defendant and against the plaintiff, no cause for action. Of course, contributory negligence being an affirmative defense, the defendant is bound to prove it by a fair preponderance of the testimony.

Now, there was a section read to you relating to the Traffic Act, relating to the rights of pedestrians and vehicles in the street and the right of pedestrians to cross. "Pedestrians, where no police officer is present and no traffic light control system is in operation, shall have the right-of-way on crossings, and vehicles must slow down and stop, if necessary, to permit pedestrians on crossings to pass."

I do not recall any evidence in this case as to whether there was a policeman or traffic lights or anything there. You may know of evidence in the case relating to that, and, of course, if you do, you take it into consideration; if you do not, you do not take it into consideration at all. But even if it should appear and you should recall that there is any evidence on the subject to the effect that there was no police officer or traffic signal, this Traffic Act, if you should find that the driver of this car violated that Act, that in itself, standing alone, is not negligence. Our Courts have said that the Traffic Act was not intended to provide a hard and fast rule, applicable to all hazards and in all situations, regardless of actual conditions, and thus liberate from re-

sponsibility one who may be otherwise reckless and indifferent to the situation of others lawfully exercising equal rights upon the highway. The Traffic Act but adds an ad-
[fol. 150] ditional factor to be considered in a given situation, by which negligence may be measured and determined between conflicting claimants exercising a common right. Violations of the Motor Vehicle Act and of the Traffic Act do not of themselves constitute negligence. That is the law as laid down by our Courts in so far as the New Jersey Traffic Act is concerned, and bringing this Traffic Act into this court the same rule would apply.

As I understand it, it is not disputed under the evidence submitted in this case that the accident happened in the City of New York and the State of New York, and, therefore, under the rule of law I charge you that the laws of the state where the accident happened control with respect to liability. Section 59 of the Motor Vehicle and Traffic Act of New York, among other things, provides that "Every owner of a motor vehicle or motorcycle operated upon a public highway shall be liable and responsible for death or injury to person or property resulting from negligence in the operation of such motor vehicle or motorcycle, in the business of such owner or otherwise, by any person legally using or operating the same, with the permission, express or implied, of such owner."

So I charge you that it is immaterial whether or not the operator, Michael Balbino, was at the time of the accident operating the automobile of the defendant, Charles Young, on his own business or on Young's business. All that is necessary for you to find is that the operator, Michael Balbino, was at the time of the accident operating this automobile with the defendant's permission, either express or implied. This article or ordinance only relates to the use of the automobile and not to the question of negligence.

If you find that the operator, Balbino, was driving this
[fol. 151] automobile at the time of the accident with the permission of the defendant, either express or implied, you must then determine the question of negligence on the part of the operator, Balbino, and the question of the contributory negligence on the part of the plaintiff.

If you find that the operator, Balbino, was negligent and that such negligence was the proximate and natural

cause of the accident and injuries, and that the plaintiff was free from contributory negligence, and also find from the evidence—which may not be disputed, but if it is that is for you to say—that permission was given to use this car and operate it, permission given by the defendant to Balbino—and I think I also said if you find that the plaintiff was not guilty of contributory negligence—then you would come to the question of the plaintiff's damages in this case.

The plaintiff would be entitled to recover as against this defendant, first, such sum as you believe to be fair and reasonable for the bodily injuries sustained. I believe there was some testimony to the effect that there was some injury to the head which required two stitches, and that there was a concussion which lasted for a period of about three months; that there were some other minor bruises on the body, and also that there was a compound, comminuted fracture of the left leg, and there was testimony as to the extent of that injury. And I think there was evidence to the effect that it was a permanent injury, but it is for you to say from the evidence what the extent of the injuries are, what the duration of the injuries will be. The testimony of the doctor, I think, as I said, was that the concussion lasted three months. If you find that that is not so, you find it from other evidence to that effect, because you must take all of the evidence in the case.

[fol. 152] So if you find for the plaintiff, the first thing you will consider is the amount to be allowed for the bodily injuries, such as I have indicated, and that amount will depend upon the extent of those injuries. It is for you to say whether the injuries in the leg are permanent as the result of this accident. That is for you to say from the evidence as you have it before you.

There was testimony, as I recall it, that this man was quite an elderly man, seventy years or more of age. You take that into consideration, too. In fact, as I said, you take all the evidence in the case into consideration.

If you find for the plaintiff and against the defendant, he would be entitled to such sum as is fair and reasonable for the pain and suffering endured from the time of the happening of the accident until that pain and suffering

ceased or until it ceases, depending on whether or not you believe there will be pain and suffering in the future.

If you find for the plaintiff he would be entitled to such sum as you believe to be fair and reasonable for the earnings lost. There was testimony to the effect that he was a tailor, to the extent that he was making coats, and that his earning averaged about sixty to seventy dollars a week, and that he had not been able to do any work from August 4, 1929, to date. It is for you to say from the evidence as you have it whether that is true or not, or whether there is a prospect of his working in the future, and if so to what extent and when. You take all those things into consideration in fixing that amount if you find for the plaintiff in this case.

If you find for the plaintiff and against the defendant he would be entitled, also, to the reasonable compensation for doctors' fees and other expenses. There is testimony to the effect that Dr. Condreras' bill of $350 is a reasonable [fol. 153] charge and Dr. Pasquale's bill of $150 is a reasonable charge, and that several items for ambulance, chair rental, for carting a chair, Columbus Hospital, crutches, X-ray laboratory, medicine, amounting to $98, plus the $350 and $150, are reasonable charges, which would make a sum of $598, as I have it here. That would be for you to say, however, if you find for the plaintiff in this case.

Now, if you find that any witness or witnesses who have testified have made any statements that you believe are untrue, that does not mean that you must necessarily reject all of their testimony. There is a legal maxim, a Latin maxim, which goes this way: "Falsus in uno, falsus in omnibus." That means, "False is one, false in all."

But our New Jersey Courts do not follow that rule. So that if you find a witness has told an untruth or more than one untruth, you can disregard that part that you believe is untrue and have a right to believe the remainder of the witness's testimony if you believe it is true, or you may disregard a witness's testimony entirely if you believe all of the testimony is false; and if you believe all the testimony is true, then you may believe all the testimony that the witness gives.

So it is for you to say what weight you will give to the evidence and what the truth of the matter is.

Now, the mere fact that counsel for the defendant made a motion for a non-suit, which is a dismissal of the case, or made a motion for a direction of a verdict—the mere fact that he did that has nothing to do with the case. That does not concern you at all. Those are simply questions of law addressed to me as the judge, that is all. You do not concern yourselves about those questions or those reasons, because your duty is to determine the facts in the case and not the law. So what counsel may have said, [fol. 154] either of them, on those motions you will entirely disregard and leave out of the case.

You must determine from the facts as you have them who is telling the truth. And if your verdict is for the plaintiff and against the defendant, then you would take the various items, the bodily injuries, the pain and suffering, the loss of earnings, and the other expenses for doctors, rental of chairs, and so forth, and you would put them into one lump sum and render a one lump sum verdict in favor of the plaintiff and against the defendant.

On the other hand, if you find a verdict in favor of the defendant, then your verdict is in favor of the defendant and against the plaintiff, no cause for action.

Take the case, give it your careful and thorough attention, and render a verdict that will square with the evidence as you have it before you.

Let the jury retire.

(The jury retired to consider of their verdict.)

[fol. 155] DEFENDANT'S EXCEPTIONS

Mr. Chance: I except to that part of the Court's charge wherein it stated that the laws of New York control on the question of liability.

I except to the part of the Court's charge wherein it read a portion of Section 59 of the Vehicle and Traffic Act of New York to the jury.

I except to the Court's charge where it was said in substance that all that is necessary to make Mr. Young responsible for Mr. Balbino's doings or omissions was the fact that permission might have been given by Mr. Young to Mr. Balbino to drive the car.

My basis for all of these objections are all of the things which I urged in the motion for a direction of a verdict and all of the things which I urged in objecting to the admission in evidence of these particular sections and parts of the New York law.

[fols. 156-158] I except upon the further ground that so to apply these New York statutes as to make Mr. Young liable for negligence on the part of Mr. Balbino, under the circumstances revealed by the evidence in this case, would be to deny to Mr. Young the equal protection of the laws, would take his property without due process of law, and would deprive him of his liberty without due process of law, all of which would be in contravention of the Fourteenth Amendment of the United States Constitution.

[fol. 159] In Supreme Court of New Jersey, Passaic County

[Title omitted]

Rule to Show Cause—Filed March 17, 1931

Application having been made on behalf of the defendant Charles Young, within six days after the verdict was rendered, for a rule to show cause why the verdict in the above entitled cause should not be set aside and a new trial granted, reserving exceptions, and said application having been duly considered:

It is, on this 17th day of March, 1931, on motion of Kellogg & Chance, attorneys for the defendant, Ordered, that the plaintiff show cause before the Supreme Court at the next term thereof at the City of Trenton, why the verdict in the above entitled cause should not be set aside and a new trial granted.

And it is further Ordered, that there are hereby reserved for appeal the exceptions taken at the trial by the counsel for the said defendant to the admission in evidence of the statute of New York, and the exception to the denial of the motion for a non-suit made by the counsel for the defendant, and the exception to the denial of the motion for a direction of a verdict, and the exceptions of defendant's said counsel to the charge of the court in so far as the same relates to the statutes of New York. And there is

[fols. 160-163] further reserved for appeal the question of whether the defendant Charles Young is legally liable under the evidence submitted in this cause for the negligence of Michael Balbino.

And it is further Ordered, that execution be, and hereby is, stayed pending an application for a new trial, and until the further order of this court.

William B. Mackay, Judge.

Service of copy of within rule to show cause is hereby acknowledged this 18th day of March, 1931.

Aaron L. Simon, Attorney for Plaintiff.

[fol. 164] In Supreme Court of New Jersey

Action at Law

Anthony Masci, Plaintiff,

vs.

Charles Young, Defendant

Remittitur—Filed November 24, 1931

It appearing from the record in the above entitled cause, that the plaintiff, Anthony Masci, had obtained a judgment against the defendant, Charles Young, in the sum of Fourteen Thousand Dollars, and the same having been prosecuted to the Supreme Court of New Jersey, on a Rule to Show Cause Why a New Trial Should not be granted, and the Supreme Court having ordered that the Rule to Show Cause be discharged upon the plaintiff consenting to a reduction of the judgment as aforestated to the sum of Ten Thousand Dollars, plaintiff, Anthony Masci, by his attorney Aaron L. Simon, does hereby consent to the reduction of said judgment to the sum of Ten Thousand Dollars.

Aaron L. Simon, Attorney for Plaintiff.

Dated: November 23rd, 1931.

[fol. 165] IN SUPREME COURT OF NEW JERSEY,
PASSAIC COUNTY

[Title omitted]

NOTICE OF APPEAL (STATING GROUNDS)—Filed November 30, 1931

To Aaron L. Simon, Esquire, Attorney of Plaintiff.

SIR:

Please Take Notice that Charles Young, defendant in the above stated cause, appeals from the whole of the judgment entered therein in the New Jersey Supreme Court, and every part thereof, to the New Jersey Court of Errors and Appeals, in the last resort in all causes, and the following are the grounds of appeal:

1. The Trial Judge erred in admitting in evidence over the objection of counsel for the defendant, Exhibit P-4, which is a part of Section 59 of Chapter 54 of the Laws of 1929 of the State of New York, entitled, "An Act relating to motor vehicles, motor cycles and highway traffic constituting Chapter 71 of Consolidated Laws," the part of said section so introduced reading as follows:

[fol. 166] "Every owner of a motor vehicle or motorcycle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle or motorcycle in the business of such owner or otherwise by any person legally using or operating the same with the permission express or implied of said owner."

to which admission in evidence exception was duly noted by defendant's counsel.

2. The Trial Judge erred in denying defendant's motion for a non-suit, to which denial of motion exception was duly entered by defendant's counsel.

* * * * * * *

5. The Trial Judge erred in denying the motion made by defendant's counsel for the direction of a verdict in favor

of the defendant which should have been granted upon one or more of the following grounds:

First, that it appears in the case that Mr. Balbino had this car under a bailment made in New Jersey, and that at the time of operating the car when the accident occurred he was not the agent or servant in any sense of Mr. Young.

* * * * * * *

[fol. 167] Fifth, because it appears from the evidence that Mr. Young was not in New York; that he made a bailment of his car in New Jersey; that the driver at the time of the accident was not Mr. Young's agent, and so to apply the law in New York as to make Mr. Young responsible for anything that Mr. Balbino did would deprive Mr. Young of his property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and would also deprive him of his liberty to contract and make contracts, in violation of the Fourteenth Amendment.

* * * * * * *

[fol. 168] 6. The Trial Judge erred in charging the jury as follows:

"Now, the accident happened in New York City, and the plaintiff claims that because of the statute in New York, a statute law, the bailor—meaning Mr. Young, the defendant —is liable in this case if there was any negligence on the part of Balbino which was the proximate cause of the accident and injuries, because this statute which was read to you creates a liability against the owner or bailor. And relying upon that New York Law, the New York law has been offered in evidence in this case; that is, Section 59 of the law, or a part of Section 59."

to which portion of the Court's charge exception was duly entered by defendant's counsel.

7. The Trial Judge erred in charging the jury as follows:

"As I understand it, it is not disputed, under the evidence submitted in this case that the accident happened in the City of New York and the State of New York, and,

therefore, under the rule of law I charge you that the laws of the state where the accident happened control with respect to liability."

to which portion of the Court's charge exception was duly entered by defendant's counsel.

8. The Trial Judge erred in charging the jury as follows:

[fol. 169] "Section 59 of the Motor Vehicle and Traffic Act of New York, among other things, provides 'Every owner of a motor vehicle or motorcycle operated upon a public highway shall be liable and responsible for death or injury to person or property resulting from negligence in the operation of such motor vehicle or motorcycle, in the business of such owner or otherwise, by any person legally using or operating the same, with the permission, express or implied, of such owner.' "

to which portion of the charge of the Court exception was duly entered by defendant's counsel.

9. The Trial Judge erred in charging the jury as follows:

"So I charge you that it is immaterial whether or not the operator, Michael Balbino, was at the time of the accident operating the automobile of the defendant, Charles Young, on his own business or on Young's business. All that is necessary for you to find is that the operator, Michael Balbino, was at the time of the accident operating this automobile with the defendant's permission, either express or implied."

to which portion of the charge of the Court exception was duly entered by defendant's counsel.

10. The verdict is contrary to law.

11. The evidence submitted in this cause does not show any legal liability on the part of the defendant, Charles Young, for the negligence of Michael Balbino.

12. The judgment in favor of Anthony Masci and against the defendant Charles Young, which has been entered in [fols. 170-173] this cause, deprives the defendant Charles Young of his property without due process of law in viola-

tion of the Fourteenth Amendment of the Constitution of the United States, and deprives him of his liberty to contract and to make contracts in violation of the said Fourteenth Amendment, and denies him equal protection of the law in violation of said Fourteenth Amendment.

Yours, &c.

Kellogg & Chance, Attorneys for Defendant-Appellant.

[fol. 174] In Court of Errors and Appeals of New Jersey

October Term, 1932

On Appeal from Supreme Court

Between

Anthony Masci, Plaintiff-Respondent,

vs.

Charles Young, Defendant-Appellant

Judgment—Filed Oct. 27, 1932

This cause having been duly argued at the May Term, 1932, of this court by Kellogg & Chance, by R. Robinson Chance, of counsel for the Appellant, and Aaron L. Simon, of counsel for the Respondent, and the court having considered the same, and finding no error in the record or proceedings in the Supreme Court—

It is thereupon, on this 17th day of October, in the year of our Lord one thousand nine hundred and thirty-two ordered and adjudged that the judgment of the Supreme Court, removed by the appeal in this cause, be affirmed with costs; and that the record be remitted to the Supreme Court to be proceeded with in accordance with this judgment and the practice of said court.

On motion of

Aaron L. Simon, Attorney for Respondent.

A true copy.

Thomas A. Mathiss, Clerk.

[File endorsement omitted.]

[fol. 175] In Court of Errors and Appeals of New Jersey

No. 108. May Term, 1932

Anthony Masci, Plaintiff-Respondent,

vs.

Charles Young, Defendant-Appellant

Argued May 20th, 1932. Decided October 17th, 1932

In a suit wherein the cause of action arose in another state, the courts of this state will apply the law of the foreign state applicable thereto when it is not penal in nature, when it is not contrary to the policy of the law of this state, and when the local judicial procedure is adequate to enforce it.

On appeal from a judgment of the Supreme Court.

For the appellant: Kellogg & Chance, Esqs.
For the respondent: Aaron L. Simon, Esq.

Opinion—Filed Oct. 17, 1932

The opinion of the court was delivered by

Donges, J.:

This appeal brings up a judgment of the Supreme Court, in favor of the plaintiff and against the defendant, entered on postea on verdict at the Passaic Circuit after a trial before Judge Mackay and a jury.

The defendant Young lent his automobile to one Balbino, who took it to the City of New York, and, whilst operating it there, collided with plaintiff and injured him, for which injuries the judgment was obtained.

The defendant Young was a resident of the State of New Jersey, and was in this state at the time of the bailment to Balbino and, likewise, at the time of the collision complained of.

The statute of New York invoked to impose liability upon the defendant provides:

"Every owner of a motor vehicles or motorcycle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from [fol. 176] negligence in the operation of such motor vehicle or motorcycle in the business of such owner or otherwise by any person legally using or operating the same with the permission express or implied of said owner."

This statute was applied at the trial and it is this action of the trial judge that is assigned as error. The question is presented on motions to the judge to control the case, as well as by exceptions to the charge and the refusal to charge.

This is a transitory action. In Ackerson vs. Erie Railroad Co., 31 N. J. L. 309, it was said:

"Transitory actions are such personal actions as seek only the recovery of money or personal chattels, whether they sound in tort or contract. They are universally founded on the supposed violation of rights, which, in contemplation of law, have no locality."

In Dennick vs. Central Railroad Company, 103 U. S. 439, it was said:

"Wherever, by either the common law or the statute law of a State, a right of action has become vested and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has competent jurisdiction of such matter and can obtain jurisdiction over the parties."

In such actions the law of the state in which the cause of action arose will by comity be applied, if comity should be extended. Harber vs. Graham, 105 N. J. L. 213.

It is not denied that the provision quoted is the law of the State of New York. The constitutionality of the act has been sustained by the courts of that state. Downing vs. City of New York, 220 N. Y. S. 76; Dawley vs. McKibbin, 245 N. Y. 557.

It seems to be the settled law that certain classes of foreign created actions will not be enforced, namely, those which are penal, those which are contrary to the policy of

the law of the state in which the suit is brought, and those for whose enforcement the local judicial procedure is inadequate.

[fol. 177] Appellant argues that the statute in question imposes a penalty. But this is obviously not so. It does not impose a penalty, it merely establishes a right. It visits only lawful damages for violation of a right. Kenneally vs. Leary, 67 N. J. L. 435.

Nor is it contrary to the policy of our law. Our statute imposes upon a non-resident, by the fact of operation of his car in this state, an agency in a designated public official to accept service of process in any action for damages arising out of such operation in this state. Such legislation has been held to be valid, and is not in contravention of the due process clause of the constitution. Kane vs. New Jersey, 242 U. S. 160; Hess vs. Pawloski, 274 U. S. 352.

Our judicial procedure is adequate to enforce this right.

The insistence of the appellant is that the New York statute can have no effect to impose liability upon an owner who is a resident of New Jersey and who was in New Jersey at the time of the occurrence complained of, when the lending or bailment took place in New Jersey. There was some testimony that the appellant knew that Balbino intended to operate the car in the State of New York. The appellant denied such knowledge and denied having said to a witness that he knew Balbino was going to New York.

In Harber vs. Graham, supra, the parties were residents of New Jersey, and drove to Massachusetts, where the injury occurred, and this court held that the accident having taken place in Massachusetts, the law of that state applied.

It is recognized by the courts generally that the use of automobiles upon the public highways presents serious hazards to the public. In Hendrick vs. Maryland, 235 U. S. [fol. 178] 610, Mr. Justice McReynolds says:

"A state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others."

In Kane vs. New Jersey, 242 U. S. 160, Mr. Justice Brandeis comments upon the danger to the public in the use of automobiles and says:

"The power of a state regulate the use of motor vehicles on its highways has been recently considered by this court and broadly sustained. It extends to non-residents as well as to residents."

He further says in commenting on the decision in Hendrick vs. Maryland, supra:

"It was recognized in discussing it, that 'the movement of motor vehicles over the highways is attended by constant and serious dangers to the public' (p. 622). We know that ability to enforce criminal and civil penalties for transgression is an aid to securing observance of laws. And in view of the speed of the automobile and the habits of men, we cannot say that the legislature of New Jersey was unreasonable in believing that ability to establish by legal proceedings within the state, any financial liability of non-resident owners, was essential to public safety. There is nothing to show that the requirement is unduly burdensome in practice. It is not a discrimination against non-residents, denying them equal protection of the law. On the contrary, it puts non-resident owners upon an equality with resident owners."

So here, an owner is presumed to know the law, and if he permits his car to be operated in New York State, he subjects himself to the laws of that state touching such operation.

The reasoning of Mr. Justice Katzenbach in Pizzutti vs. Wuchter, 103 N..J. L. 130, in support of the power of a state to require an owner who uses or permits his property to be used in a foreign state, to submit himself to the courts of that state on process served upon a public official as his agent for such purpose, is pertinent. He holds that states, in the exercise of the police power, may impose the terms upon which their highways may be used by motor vehicles of non-resident owners, and says:

[fols. 179-181] "We think the basis of jurisdiction in the present case over the defendant, who was not a citizen of

this state, not served with process within the state, and who has not expressly consented to the exercise of jurisdiction of our courts over him, rests upon the doctrine that a state may, without violating any constitutional limitation, forbid the doing of certain acts within the state unless and until the person who does the acts has consented to the jurisdiction of the courts of the state as to causes of action growing out of the doing of such acts within this state. It is within the power of a state to provide by law that the doing of such acts by a non-resident as the state can prohibit shall subject to the non-resident doing them to the jurisdiction of our courts as to such actions as arise within the territorial limits of the state.

"Such laws as the one under consideration seem but the reasonable exercise of the rights of a state for protection of its own citizens. If non-residents feel the law harsh they can easily avoid its operation, so far as they are concerned, by refraining from operating their automobiles within the territorial limits of the states which have enacted such laws."

If a state may, without violating the constitution of the United States, forbid a non-resident to operate or cause to be operated an automobile within the State, unless thereby he authorizes a state official to receive service to process in actions instituted against him which result from such operation, and makes himself subject to the laws of this state, Kane vs. New Jersey, supra, a state may impose upon an owner of such car liability for such permitted operation of his car within a state, according to the law of that state. If the rule were otherwise, a foreign owner might send his car into a state and avoid liability for its negligent operation under the law of the state upon the ground that no liability would attach to him in consequence of such negligent operation under the law of his own state. Such a result does violence to reason and justice.

The judgment of the Supreme Court is affirmed.

[File endorsement omitted.]

[fol. 182] IN COURT OF ERRORS AND APPEALS OF NEW JERSEY

(Title Omitted)

ASSIGNMENT OF ERRORS—Filed Jan. 7, 1933

Now comes the Appellant, Charles Young, and makes the following Assignments of Errors in the above-entitled cause:

1. The New Jersey Court of Errors and Appeals erred in deciding that Section 59 of Chapter 54 of the Laws of 1929 of the State of New York, which is as follows:

"Every owner of a motor vehicle or motorcycle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle or motorcycle in the business of such owner or otherwise by any person legally using or operating the same with the permission express or implied of said owner."

is valid and is not repugnant to Section 10 of Article 1 of the Constitution of the United States and not repugnant to the 14th Amendment to the Constitution of the United States in its application to the Appellant, said Charles Young, in this case.

2. The New Jersey Court of Errors and Appeals erred in affirming the judgment of the Supreme Court of New Jersey, denying Defendant's motion to strike out the first and second counts of Plaintiff's Amended Complaint, which for cause of action set out Sec. 59, Ch. 54 of the Laws of 1929 of the State of New York, above quoted, and in deciding that said statute in its application to the Appellant in this case, was valid, and did not deny him equal protection of the Law, and did not deprive him of liberty and property without due process of law, in contravention of the 14th Amendment to the Constitution of the United States.

[fol. 183] 3. The New Jersey Court of Errors and Appeals erred in affirming the judgment of the New Jersey Supreme Court, in admitting in evidence at the trial, over the ob-

jection and exception of the defendant, Sec. 59, Ch. 54 of the Laws of 1929 of the State of New York, above quoted; and erred in deciding that such application of such statute to the Appellant, Charles Young, in this case was valid, was not repugnant to the 14th Amendment to the Constitution of the United States, did not deny him equal protection of the law, and did not deprive him of liberty or property without due process of law.

4. The New Jersey Court of Errors and Appeals erred in affirming the judgment of the New Jersey Supreme Court in denying the motion of the Defendant, Charles Young, made at the close of all the evidence, to direct the jury to return a verdict in his favor, and erred in failing to decide that to apply said Sec. 59, Ch. 54 of the 1929 Laws of New York to Appellant, Charles Young, in this case would deprive him of his property without due process of law in violation of the 14th Amendment to the Constitution of the United States; would deprive him of his liberty to contract and make contracts, in violation of the 14th Amendment; would deny him the equal protection of the laws in violation of the 14th Amendment, and would violate Section 10 of Article 1 of the Constitution of the United States by impairing the obligation of an existing contract of the Appellant, Charles Young.

5. The New Jersey Court of Errors and Appeals erred in affirming the judgment of the New Jersey Supreme Court and its action in charging the jury, over the objection and exception of the Defendant, Charles Young, as follows:

"As I understand it, it is not disputed under the evidence submitted in this case that the accident happened in the City of New York and the State of New York, and, therefore, under the rule of law I charge you that the laws [fol. 184] of the state where the accident happened control with respect to liability. Section 59 of the Motor Vehicle and Traffic Act of New York, among other things, provides that 'Every owner of a motor vehicle or motorcycle operated upon a public highway shall be liable and responsible for death or injury to person or property resulting from negligence in the operation of such motor vehicle or motorcycle, in the business of such owner or

otherwise, by any person legally using or operating the same, with the permission, express or implied, of such owner.'

"So I charge you that it is immaterial whether or not the operator, Michael Balbino, was at the time of the accident operating the automobile of the defendant, Charles Young, on his own business or on Young's business. All that is necessary for you to find is that the operator, Michael Balbino, was at the time of the accident operating this automobile with the defendant's permission, either express or implied. This article or ordinance only relates to the use of the automobile and not to the question of negligence.

"If you find that the operator, Balbino, was driving this automobile at the time of the accident with the permission of the defendant, either express or implied, you must then determine the question of negligence on the part of the operator, Balbino, and the question of the contributory negligence on the part of the plaintiff.

"If you find that the operator, Balbino, was negligent and that such negligence was the proximate and natural cause of the accident and injuries, and that the plaintiff was free from contributory negligence, and also find from the evidence—which may not be disputed, but if it is that is for you to say—that permission was given to use this car and operate it, permission given by the defendant—to Balbino—and I think I also said if you find that the plaintiff was not guilty of contributory negligence—then you would come to the question of the plaintiff's damages in this case.

"The plaintiff would be entitled to recover as against this defendant, first, such sum as you believe to be fair and reasonable for the bodily injuries sustained."

and erred in deciding that Sec. 59, Ch. 54 of the 1929 Laws of New York as so applied to the Appellant, Charles Young, in this case, was valid and did not deprive him of liberty or property without due process of Law, did not deny him the equal protection of the Law, in violation of the 14th Amendment to the Constitution of the United States, and did not impair the obligation of an existing contract of the Appellant, Charles Young, in violation of

Section 10 of Article 1 of the Constitution of the United States.

[fol. 185] For which errors the Appellant prays that the Judgment of the New Jersey Court of Errors and Appeals be reversed, and that appropriate Judgment in his favor be rendered.

R. Robinson Chance, Counsel for Appellant, Charles Young.

[fol. 185½] Service of 1 true copy of the within instrument is hereby acknowledged this 6th day of Jan. 1933.

Aaron L. Simon, Attorney of Plaintiff.

[File endorsement omitted.]

[fol. 186] In Supreme Court of the United States

[Title omitted]

Order Allowing Appeal—Filed Jan. 7, 1933

Upon consideration of the Petition of Charles Young praying for the allowance of an appeal to the Supreme Court of the United States, from the judgment herein rendered on October 27, A. D. 1932 by the New Jersey Court of Errors and Appeals, it is hereby ordered that the appeal is allowed upon the approval and filing of bond in the sum of $12,000 to act as a supersedeas bond, and conditioned as required by law.

Owen J. Roberts, Associate Justice of the Supreme Court of the United States.

[fols. 186½-194] [File endorsement omitted.]

Service of 1 true copy of the within instrument is hereby acknowledged this 6th day of Jan. 1933.

Aaron L. Simon, Attorney of Plaintiff.

[fol. 195] SUPREME COURT OF UNITED STATES

STATEMENT OF POINTS AND DESIGNATION FOR PRINTING RECORD—Filed Jan. 27, 1933

Now comes the Appellant in the above-entitled cause and states that the points upon which he intends to rely in this case are as follows:

Point 1. The Statute of the State of New York, Sec. 59, Ch. 54 of the Laws of 1929 is unconstitutional and void in its application to the Appellant in this case and repugnant to Sec. 10, Article 1 of the Constitution of the United States in that it impairs the obligation of an existing contract of the Appellant.

Point 2. The aforesaid Statute of the State of New York is unconstitutional and void and repugnant to the 14th Amendment to the Constitution of the United States in that in its application to the Appellant in this case it deprives him of liberty without due process of law.

Point 3. The aforesaid Statute of the State of New York is unconstitutional and void and repugnant to the 14th Amendment to the Constitution of the United States in that in its application to the Appellant in this case it deprives him of property without due process of law.

Point 4. The aforesaid Statute of the State of New York is unconstitutional and void and repugnant to the 14th Amendment to the Constitution of the United States in that in its application to the Appellant in this case the State of New Jersey denies him the equal protection of the law of New Jersey.

Point 5. The New Jersey Court of Errors and Appeals erred in deciding that the aforesaid Statute of the State of New York was a valid and constitutional law as applied to the Appellant in this case.

Designation for Printing Record

The Clerk will please print the portions of the Record specified below:

1. Amended Complaint.
2. Notice of Motion to Strike out Amended Complaint and parts thereof.

[fol. 196] 3. Rule denying Motion to Strike out Amended Complaint and parts thereof.

4. Answer to Amended Complaint.

5. Postea (P. 25-A Record).

6. Judgment on Postea (P. 25-B Record).

7. Appearances (P. 26 Record).

8. The testimony of Michael Balbino.

9. Beginning with the words "The Court" in the 24th line of page 73, to and including the words "The Court-Oh Yes" in the 11th line of page 74.

10. Last five lines of page 74, beginning "Mr. Simon."

11. The words "Mr. Chance" in 17th line of page 75.

12. Beginning with the words "And I object to it further" in 29th line of page 76, to and including the first three lines on page 77.

13. Beginning with the words "The Court" in 12th line of page 79, to and including the word "Admission" in the 16th line.

14. Beginning with the words "Mr. Simon" in line 16, page 84 to end of page 84.

15. Testimony of Anthony Masci.

16. "The Plaintiff rested" on page 100.

17. All of page 101.

18. First 4 lines of page 102, and beginning with "By Mr. Simon" in line 22 of page 102, to and including the words "of 1929" in line 23 of page 103.

19. Testimony of Lena Balbino.

20. Testimony of Michael Balbino (pp. 114-132 inc.).

21. "The Defendant rested" on page 139.

22. All of pages 140 to 143, inclusive.

23. "Motion for Direction of Verdict" and first 7 lines of page 144, and beginning with the word "Fifth" in line 27 of page 144, to and including the words "Yes, exception", in 16th line of page 145.

24. The Charge of the Court.

25. Beginning with the words "Mr. Chance" in the 5th line of page 155, to and including the words "New York law" in the 21st line of page 155.

[fol. 197] 26. Beginning with the words "I except upon" in the 21st line of page 156 to and including the words "United States Constitution" in line 30 of page 156.

27. Rule to Show Cause (pp. 159-160).

28. Remittitur (p. 164).
29. All of page 165.
30. All of page 166, excepting paragraphs numbered "3" and "4."
31. First 14 lines of page 166—last 10 lines of page 166.
32. Paragraph numbered "Fifth" beginning with 19th line of page 167.
33. All of page 168, excepting first two lines.
34. All of page 169.
35. All of page 170.
36. Final judgment of the New Jersey Court of Errors and Appeals.

R. Robinson Chance, Daniel Thew Wright, Counsel for Appellant.

[fol. 198] Service of 1 true copy of the within instrument is hereby acknowledged this 6th day of Jan., 1933.

Aaron L. Simon, Attorney of Plaintiff-Appellant.

[fol. 199] [File endorsement omitted.]

Endorsed on cover: File No. 37,340. New Jersey Court of Errors and Appeals. Term No. 643. Charles Young, appellant, vs. Anthony Masci. Filed January 27, 1933. File No. 37,340.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Statutory provision sustaining jurisdiction	1
State statute involved	2
Date of judgment sought to be reviewed and date upon which application for appeal was presented	3
Nature of the case	3
Cases sustaining jurisdiction	4
Appeal is now the correct procedure	5

Table of Cases Cited.

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282	4
Fiske v. Kansas, 274 U. S. 380	4
Great Northern Ry. Co. v. State of Minnesota, 278 U. S. 503	5
Nashville C. & St. L. R. Co. v. White, 278 U. S. 456	5

Statutes Cited.

Act of Congress of January 31, 1928 (Chapter 14, 45 Stat. 54)	5
Judicial Code, Section 237 (a), as amended by the Act of February 13, 1925 (Chapter 229, 43 Stat. 936)	2
Laws of 1929 of the State of New York, Chapter 54, Section 59.	2
Cahill's Cons. L. N. Y., 1930, P. 2573	3
United States Constitution, Article I, Section 10	2
14th Amendment, Section 1	2

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 643

CHARLES YOUNG, APPELLANT,

vs.

ANTHONY MASCI.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

STATEMENT OF JURISDICTION.

The basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the New Jersey Court of Errors and Appeals in this cause is:

1. Such Court is the highest court of the State of New Jersey in which a decision in this suit could be had.

2. In this suit there is drawn in question the validity of a statute of the State of New York in its application to this case, on the ground of its being repugnant to the Constitution of the United States Sec. 237(*a*) Jud. Code as amended Feb. 13, 1925, Chap. 229, 43 Stat. 936):

> "SEC. 237(*a*). A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

The New York Statute in question is particularly repugnant to Section 10 of Article I of the Constitution of the United States, and repugnant to the provisions of Section 1 of the 14th Amendment to such Constitution, and the decision of the New Jersey Court of Errors and Appeals is in favor of its validity. Such statute is part of Section 59, Chapter 54 of the Laws of 1929 of the State of New York, and is as follows:

> "Every owner of a motor vehicle or motorcycle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle or motorcycle in the business of such owner or otherwise by any person legally using or operating the

same with the permission express or implied of said owner." (Laws N. Y. 1929, Vol. 1, p. 82. Cahill's Cons. L. N. Y. 1930, p. 2573.)

3. Date of judgment sought to be reviewed—October 27, 1932.

4. Application for appeal presented on January 5, 1933.

Nature of the Case.

One Masci, a citizen of New York, sued the appellant, Charles Young, a citizen of New Jersey in the New Jersey Supreme Court, Passaic County. For cause of action Masci, by amended complaint, pleaded the New York Statute above quoted, also averring that he had been injured in the City and State of New York through the negligent operation by one Balbino of an automobile owned by the Appellant, Charles Young. Appellant, Young, answered the amended complaint, admitting ownership of the automobile, averring that he never had had any knowledge of the law of New York in question, that he had loaned the automobile to Balbino in New Jersey, was himself a citizen and resident of New Jersey, had had no knowledge that Balbino intended to drive the automobile into New York, that it was not being driven by the Appellant, nor for him, nor in or about his business, nor by anyone for whose conduct he was responsible, and that he was not in the State of New York at the time the automobile was in that State. The question of the repugnancy of the New York Statute to the Constitution of the United States was raised by motion to strike out the amended complaint, by the answer, by objection to admission

of the statute in evidence at the trial, by motion for non-suit at the conclusion of plaintiff's evidence, by motion for directed verdict at the conclusion of all the evidence, and by exceptions to the court's charge to the jury. The trial court overruled the motion to strike out the complaint, the motions for non-suit and directed verdict, the objection to the admission of the statute in evidence, held that the New York Statute as applied to the case is not repugnant to any part of the Constitution of the United States, charged the jury that the New York Statute, as above quoted, operated extra-territorially over the Appellant, Young, and that he, being the owner of the car, was liable in any event, provided only the accident was occasioned by the negligence of the driver in the State of New York. A verdict for $14,000 was returned, remittitur of $4,000 and judgment rendered against Appellant, Young, for $10,000. On appeal to the New Jersey Court of Errors and Appeals the validity of the New York Statute was sustained, and the judgment affirmed.

Cases Sustaining Jurisdiction.

"A decision of a state court applying and enforcing a state statute of general scope against a particular transaction, as to which there was a distinct and timely insistence that if so applied the statute was void as in violation of the Federal Constitution, necessarily affirms the validity of the statute as so enacted, and the judgment is reviewable on writ of error under paragraph 237 of the Judicial Code."

Fiske v. *Kansas*, 274 U. S. 380.

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282.

Appeal Is Now the Correct Procedure.

Act of Congress of January 31, 1928 (Chap. 14, 45 Stat. 54):

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the writ of error in cases, civil and criminal is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtained by appeal."

Nashville, C. & St. L. R. Co. v. *White*, 278 U. S. 456.

Great Northern Ry. Co. v. *State of Minnesota*, 278 U. S. 503.

R. ROBINSON CHANCE,
Counsel for Charles Young.

No. 643

JAN 31
CHARLES ELMORE

Supreme Court of the United States

CHARLES YOUNG, *Appellant*

vs.

ANTHONY MASCI, *Appellee*

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS APPEAL

DANIEL THEW WRIGHT,
R. ROBINSON CHANCE,
Counsel for Appellants.

W. F. ROBERTS CO. WASHINGTON D. C.



Supreme Court of the United States

CHARLES YOUNG, *Appellant*

vs.

ANTHONY MASCI, *Appellee*

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS APPEAL

It is obvious that appellee's counsel seeks to convey the impression that the case involves merely the construction of a valid statute, or the question whether one State will extend comity to a valid statute of another State. Of course neither of those questions are federal questions.

The position taken in the papers served for appellee, that we assumed the New York statute to be valid if applied and enforced to impose liability on Young, who was never within the legislative jurisdiction of New York, is refuted by the record.

The constitutional question was definitely and distinctly raised in the trial court by paragraphs 5 and 9 of the motion to strike out the amended complaint (R. 14-15) : by objection to the admission of the New York statute in evidence (R. 76-77) : by motion to direct a verdict at the conclusion of the evidence (R. 144-145) : by exception to the courts

charge to the jury (R. 155-156): by express reservation of these questions for appeal (R. 159-160): by the "Grounds for Appeal" (R. 165-170):

In New York *ex rel.* Bryant *v.* Zimmerman, 278 U. S. 63, 67; 73 L. Ed. 184, 187, was said:—

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.
>
> Of course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough."

The New Jersey Court of Errors and Appeals recognized that appellant Young did not assume the statute to be valid to impose liability upon him. Beginning with the paragraph which starts: "The insistence of the appellant is that the New York statute can have no effect to impose liability upon an owner who is a resident of New Jersey and who was in New Jersey at the time of the occurrence complained of, when the lending or bailment took place in New Jersey."—and continuing to the end of the opinion, the Court of Errors and Appeals considers and decides whether the New York statute could, without violating the United States Constitution, impose liability upon Young under the circumstances of this case. In view of what was said in the opinion

it is evident that the Court of Errors and Appeals recognized that we were denying rather than assuming validity of the statute in so far as extra-territorial effect was claimed for it.

In view of the fact that the Court of Errors and Appeals actually decided the federal question adversely to Young the following cases are pertinent:—

In Manhattan Life Ins. Co. *v.* Cohen, 234 U. S. 123, 134; 58 L. Ed. 1245, 1253 reference is made to

> "the elementary rule that it is irrelevant to inquire how and when a Federal question was raised in a court below when it appears that such question was actually considered and decided."

In Miedreich *v.* Lauenstein, 232 U. S. 236, 243; 58 L. Ed. 584, 589 the court said:—

> "Where the state court holds that a Federal question is made before it, according to its practice and proceeds to determine it, this court will regard the question as duly made."

North Carolina R. Co. *v.* Zachary 232 U. S. 248, 257; 58 L. Ed. 591, 595 answers the objection that a Federal question was not properly raised, thus:—

> "But this is a question of state practice; and since it appears that defendant expressly claimed immunity by reason of the act of Congress, and the highest court of the state either decided or assumed that the record sufficiently presented a question of Federal right, and decided against the party asserting that right, the decisions of this court render it clear that it is our duty to pass upon the merits of the Federal question."

In Chambers *v.* B. & O. R. Co. 207 U. S. 142, 148; 52 L. Ed. 143, 146, is said:—

> "The defendant objects to our jurisdiction to re-examine the judgment because the Federal question was not properly and seasonably raised in the courts of the state. But it clearly and unmistakably appears from the opinion of the Supreme Court that the Federal question was assumed to be in issue, was decided against the claim of Federal right, and that the decision of the question was essential to the judgment rendered. This is enough to give this court the authority to re-examine that question on writ of error."

In Mallinckrodt Chemical Works *v.* Missouri, 238 U. S. 41, 49; 59 L. Ed. 1192, 1195, is said:—

> "There is a motion to dismiss, based upon the ground that the Federal questions here set up were not raised in the trial court, or in the Supreme Court of the state with sufficient definiteness to comply with Sec. 237 Judicial Code (act of March 3, 1911, 36 Stat. at L. 1087, 1156, Chap. 231, Comp. Stat. 1913, 968, 1214. It appears, however, from the opinion of the Supreme Court that the question of equal protection under the Fourteenth Amendment was treated as being sufficiently raised, and was specifically dealt with and ruled against the plaintiff in error. This is sufficient to confer jurisdiction upon this court and the motion to dismiss must be denied."

See also Chicago Rock Island and Pacific Ry. *v* Perry, 259 U. S. 548; 66 L. Ed. 1056, Syllabus 1.

The fact that the decision of the Constitutional question was essential to the judgment rendered by the New Jersey Court of Errors and Appeals, is established by considering that the amended complaint

pleaded the New York statute, and set out no other cause of action: a judgment for plaintiff, necessarily affirmed the validity of that statute. The same result follows from the charge of the Trial Court to the jury, the correctness of which was affirmed; the Trial Court charged:

> "As I understand it, it is not disputed under the evidence submitted in this case that the accident happened in the City of New York and the State of New York, and, therefore, under the rule of law I charge you that the laws of the state where the accident happened control with respect to liability. * * * So I charge you that it is immaterial whether or not the operator, Michael Balbino, was at the time of the accident operating the automobile of the defendant, Charles Young, on his own business or on Young's business. All that is necessary for you to find is that the operator, Michael Balbino, was at the time of the accident operating this automobile with the defendant's permission, either express or implied. * * * If you find that the operator, Balbino, was driving this automobile at the time of the accident with the permission of the defendant, either express or implied, you must then determine the question of negligence on the part of the operator, Balbino, and the question of the contributory negligence on the part of the plaintiff. If you find that the operator, Balbino, was negligent and that such negligence was the proximate and natural cause of the accident and injuries, and that the plaintiff was free from contributory negligence, and also find from the evidence—which may not be disputed, but if it is that is for you to say—that permission was given by the defendant to Balbino—and I think I also said if you find that the plaintiff was not guilty of contributory negligence—then you would come to the question of the plaintiff's damages in this

case. The plaintiff would be entitled to recover as against this defendant, first, such sum as you believe to be fair and reasonable for the bodily injuries sustained."

From which it is manifest, that the New Jersey Court of Errors and Appeals could not have approved this charge, and decided the case, without affirming the validity of the New York Statute as applied to the case, all against the appellant's claim that the Statute so applied, violated the Constitution of the United States.

The cases cited by Appellee, as making against jurisdiction, are not very closely in point.

Michigan Cent. Railroad Co. *vs.* Mich. Sou. 60, U. S. 378, 15 L. Ed. 689 in substance holds that jurisdiction must appear by direct allegation or necessary intendment. Our reply to this is that it does appear and that the state court decided the Federal question in its opinion, and erroneously decided it.

Murdock *vs.* Memphis, 87 U. S. 590, 22 L. Ed. 429 presents a lengthy outline of the points essential to jurisdiction but we see nothing in it which leads to a conclusion that there was not drawn in question in the case sub judice, the validity of the New York statute if applied and enforced to impose liability upon Young who had never been in New York, and was not amenable to New York law.

Miller *v.* Cornwall R. R. 168 U. S. 131, 42 L. Ed. 409 holds that the validity of a statute is drawn in question whenever the power to enact it, as it is by its terms, or is made to read by construction, is fairly open to denial and is denied. We think this case supports our contention rather than that of the appellee. It has been our continuous protest that the New York legislature had no power to enact a law

which could impose liability upon an owner who is a resident of New Jersey and who was in New Jersey at the time of the occurrence complained of, when the lending or bailment took place in New Jersey, under the law of which state the bailor is not liable for the negligence of the bailee; and opinion of the Court of Errors and Appeals expressly recognizes that we so insisted.

If the above cases and those cited in the statement of jurisdiction filed by appellant did not entitle him to have the case reviewed by appeal, the rule now is that mistake in adopting the procedure of appeal when certiorari should have been taken, is not fatal. (Judicial Code, Section 237-c, as amended by Act of February 13, 1925, 43 Stat. 937; Title 28, USCA, Section 344, sub-division c.) One case illustrating this is R[illegible]he *v.* McDonald, 275 U. S. 449, 72 L. Ed. 365, where a writ of error was dismissed, certiorari granted, the case considered on its merits and judgment therein reversed. But the appeal was properly allowed in this case and that the motion to dismiss should be denied, is

Respectfully submitted,

DANIEL THEW WRIGHT
R. ROBINSON CHANCE
Counsel for Appellant.



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Supreme Court of the United States

No. 643

CHARLES YOUNG, *Appellant*

vs.

ANTHONY MASCI, *Appellee*

BRIEF FOR APPELLANT

OCTOBER TERM 1932

DANIEL THEW WRIGHT,
R. ROBINSON CHANCE,
PHILIP ERSHLER
Counsel for Appellant.

W. F. ROBERTS CO. WASHINGTON D. C.

INDEX

	Page
Nature of the Case	1
Assignments of Errors	3
Argument	9
The Application of the N. Y. Statute Offends Sec. 10, Art. 1 of the Constitution	9
State Statutes Have No Extra-Territorial Operation	12
The Application of the N. Y. Statute Offends the 14th Amendment to the Constitution	17
Denial of Equal Protection of the Law	21

STATUTES CITED

Laws of New York 1929 V. 1, p. 82 Cahills Cons. L. N. Y. 1930, p. 2573	2

CASES CITED

Adair *vs.* U. S., 208 U. S. 161	18
Allgeyer *vs.* Louisiana, 165 U. S. 589	18
American Banana Co. *vs.* Fruit Co., 213 U. S. 347	12
Carter *vs.* Texas, 177 U. S. 442	21
Coppage *vs.* Kansas, 236 U. S. 14	19
Danke-Walker Co. *vs.* Bondurant, 257 U. S. 282	8
Dewey *vs.* Des Moines, 173 U. S. 193	15
Doran *vs.* Thompson, 76 N. J. L. 754	10
Fiske *vs.* Kansas, 274 U. S. 380	8

Page

Gavin *vs.* Cohen, 136 Atl. 330 10

Heiner *vs.* Donnan, 285 U. S. 312 19

Home Telephone Co. *vs.* Los Angeles, 227 U. S. 278 22

Lee *vs.* Hopkins, 118 U. S. 356 22

Meyers *vs.* Nebraska, 262 U. S. 399 20

Maurer *vs.* Brown, 106 N. J. L. 284 10

N. Y. L. E. *vs.* New Jersey Elec. Co., 60 N. J. L. 338 10

N. Y. Life Ins. Co. *vs.* Head, 234 U. S. 160 13

Pennoyer *vs.* Neff, 95 U. S. 714 12

Sanford *vs.* McDonald, 248 U. S. 185 12

Scott *vs.* McNeal, 154 U. S. 45 21

Twin City Pipe Co. *vs. Harding Co.*, 283 U. S. 353 20

Wolff Packing Co. *v.* Court of Indust. Rel., 262 U. S. 399 20

Supreme Court of the United States

No. 643

CHARLES YOUNG, *Appellant*

vs.

ANTHONY MASCI, *Appellee*

BRIEF FOR APPELLANT

The case is here on appeal from a judgment of the New Jersey Court of Errors and Appeals, affirming against the appellant, a judgment which was rendered by the New Jersey Supreme Court for Passaic County, a trial court of original jurisdiction. The case is reported in 162 Atl. 623.

The authorities sustaining the jurisdiction of this Court on appeal, appear in appellant's "Brief Opposing Motion to Dismiss Appeal," to which reference is made.

NATURE OF THE CASE

The appellant, Young, was a citizen and resident of the State of New Jersey; Masci the appellee, a citizen and resident of the State of New York. One Balbino, a friend of Young, wishing to take his family for a pleasure ride, borrowed Young's automobile in New Jersey, for that purpose. (R. 43-13.)

There was no "hiring" of the automobile. The bailment took place in the State of New Jersey.

Young had no knowledge where Balbino intended to drive, and it is doubtful from the evidence whether Balbino knew himself at the time he borrowed the car. Young had not been in New York, had no knowledge of the Laws of New York, and the thought that Balbino might possibly drive the car out of the State of New Jersey never occurred to him. However, Balbino, after having accumulated his family, in his meanderings did journey into the City and State of New York, and there accidentally struck the appellee, Masci, who was a pedestrian upon the street of New York City.

Masci sued Young in the New Jersey Supreme Court for Passaic County. His Amended Complaint contained two counts (R. 1) both based upon a Statute of the State of New York, which was pleaded verbatim in the Amended Complaint and is as follows:—

> "Every owner of a motor vehicle or motorcycle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle or motorcycle in the business of such owner or otherwise by any person legally using or operating the same with the permission express or implied of said owner." (Laws N. Y. 1929, Vol. 1, p. 82, Cahill's Cons. L. N. Y. 1930, p. 2573.)

From the inception of the case, the appellant Young contended that the application of the New York Statute to him in the case, violated parts of the Constitution of the United States.

The constitutional questions were raised in the trial court by Motion to Strike out the Amended Complaint (R. 5), by objection to the admission

of the New York Statute in evidence at the trial (R. 28), by Motion for a Non-Suit at the conclusion of plaintiff's evidence by Motion for a Directed Verdict at the conclusion of all the evidence (R. 75-76), and by exception to the Court's charge to the jury (R. 83-84). The trial resulted in a verdict for Masci and against Young for $14,000; remittitur of $4,000 and judgment for $10,000 against Young entered. (R. 11.) The constitutional questions were expressly specified for determination by the New Jersey Court of Errors and Appeals, which method seems to be appropriate practice in the State of New Jersey (R. 84).

ASSIGNMENT OF ERRORS

1. The New Jersey Court of Errors and Appeals erred in deciding that Section 59 of Chapter 54 of the Laws of 1929 of the State of New York, which is as follows:

> "Every owner of a motor vehicle or motorcycle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle or motorcycle in the business of such owner or otherwise by any person legally using or operating the same with the permission express or implied of said owner."

is valid and is not repugnant to Section 10 of Article 1 of the Constitution of the United States and not repugnant to the 14th Amendment of the Constitution of the United States in its application to the Appellant, said Charles Young, in this case.

2. The New Jersey Court of Errors and Appeals erred in affirming the judgment of the Supreme Court of New Jersey, denying Defendant's motion to strike out the first and second counts of Plaintiff's Amended Complaint, which for cause of action set out Sec. 59, Ch. 54 of the Laws of 1929 of the State of New York, above quoted, and in deciding that said statute in its application to the Appellant in this case, was valid, and did not deny him equal protection of the Law, and did not deprive him of liberty and property without due process of law, in contravention of the 14th Amendment to the Constitution of the United States.

3. The New Jersey Court of Errors and Appeals erred in affirming the judgment of the New Jersey Supreme Court, in admitting in evidence at the trial, over the objection and exception of the defendant, Sec. 59, Ch. 54 of the Laws of 1929 of the State of New York, above quoted; and erred in deciding that such application of such statute to the Appellant, Charles Young, in this case was valid was not repugnant to the 14th Amendment to the Constitution of the United States, did not deny him equal protection of the law, and did not deprive him of liberty or property without due process of law.

4. The New Jersey Court of Errors and Appeals erred in affirming the judgment of the New Jersey Supreme Court in denying the motion of the Defendant, Charles Young, made at the close of all the evidence, to direct the jury to return a verdict in his favor, and erred in failing to decide that to apply said Sec. 59, Ch. 54 of the 1929 Laws of New York to Ap-

pellant, Charles Young, in this case would deprive him of his property without due process of law in violation of the 14th Amendment to the Constitution of the United States; would deprive him of his liberty to contract and make contracts, in violation of the 14th Amendment; would deny him the equal protection of the laws in violation of the 14th Amendment, and would violate Section 10 of Article 1 of the Constitution of the United States by impairing the obligation of an existing contract of the Appellant, Charles Young.

5. The New Jersey Court of Errors and Appeals erred in affirming the judgment of the New Jersey Supreme Court, and its action in charging the jury, over the objection and exception of the Defendant, Charles Young, as follows:

> "As I understand it, it is not disputed under the evidence submitted in this case that the accident happened in the City of New York and the State of New York, and, therefore, under the rule of law I charge you that the laws of the state where the accident happened control with respect to liability. Section 59 of the Motor Vehicle and Traffic Act of New York, among other things, provides that 'Every owner of a motor vehicle or motorcycle operated upon a public highway shall be liable and responsible for death or injury to person or property resulting from negligence in the operation of such motor vehicle or motorcycle, in the business of such owner or otherwise, by any person legally using or operating the same, with the permission, express or implied, of such owner.'

"So I charge you that it is immaterial whether or not the operator, Michael Balbino, was at the time of the accident operating the automobile of the defendant, Charles Young, on his own business or on Young's business. All that is necessary for you to find is that the operator, Michael Balbino, was at the time of the accident operating this automobile with the defendant's permission, either express or implied. This article or ordinance only relates to the use of the automobile and not to the question of negligence.

"If you find that the operator, Balbino, was driving this automobile at the time of the accident with the permission of the defendant, either express or implied, you must then determine the question of negligence on the part of the operator, Balbino, and the question of the contributory negligence on the part of the plaintiff.

"If you find that the operator, Balbino, was negligent and that such negligence was the proximate and natural cause of the accident and injuries, and that the plaintiff was free from contributory negligence, and also find from the evidence—which may not be disputed, but if it is that is for you to say—that permission was given to use this car and operate it, permission given by the defendant to Balbino—and I think I also said if you find that the plaintiff was not guilty of contributory negligence—then you would come to the question of the plaintiff's damages in this case.

"The plaintiff would be entitled to recover as against this defendant, first, such sum as you believe to be fair and reasonable for the bodily injuries sustained."

and erred in deciding that Sec. 59, Ch. 54 of the 1929 Laws of New York as so applied to the Appellant, Charles Young, in this case, was valid and did not deprive him of liberty or property without due process of Law, did not deny him the equal protection of the Law, in violation of the 14th Amendment to the Constitution of the United States, and did not impair the obligation of an existing contract of the Appellant, Charles Young, in violation of Section 10 of Article 1 of the Constitution of the United States.

As to the parts of the Constitution invoked by Appellant the assignments of errors, five in number, (R. 95) challenge the judgment of the New Jersey Court of Errors and Appeals in that the application of the New York Statute to the appellant Young, in this case, is repugnant to Section 10 of Article I, and repugnant to the 14th Amendment of the Federal Constitution.

The appellant Young contends, and contended below:

I. That the application to him of the New York Statute in this case, impaired the obligations of his existing contract of bailment made by him with Balbino in the State of New Jersey in the loaning of the car, and by which contract, valid and lawful in the State of New Jersey where made, he was by the law of the state in which it was made, protected against and exempted from the very liability for Balbino's negligence, which the Statute of New York would place upon him, if applied to him. This is in violation of Section 10, of Article I, of the Federal Constitution.

II. The appellant Young contends that the application of the New York Statute to him in this case, deprives him of liberty without due process of law, in that it deprives him of liberty to make and to enjoy his immunity from liability under his contract of bailment valid by the law of his domicile in the state where it was made, and which by the law of that state protects him against this particular liability for the Bailee's negligence.

III. The appellant Young contends that the application of the New York Statute to him in this case deprives him of property without due process of law, in that it imposes a liability in personam upon him, who was never in New York State, was never amenable to its laws, and in satisfaction of that personal liability deprives him of property which was never in the State of New York and never amenable to its laws, in violation of the 14th Amendment.

IV. The appellant Young claims that the application of the New York Statute to him in this case denies him the equal protection of the laws of New Jersey, which protects all citizens of New Jersey from liability for the negligence of a bailee under a contract of bailment made in the State of New Jersey.

> "A decision of a state court applying and enforcing a state statute of general scope against a particular transaction, as to which there was a distinct and timely insistence that if so applied the statute was void as in violation of the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is reviewable on writ of error under paragraph 237 of the Judicial Code."
>
> Fiske *v.* Kansas, 274 U. S. 380.
>
> Dahnke-Walker Milling Co. *v.* Bondurant, 257 U. S. 282.

ARGUMENT

THE APPLICATION OF THE NEW YORK STATUTE TO YOUNG IN THIS CASE, OFFENDS SEC. 10 OF ART. 1 OF THE CONSTITUTION

"No State shall pass any law impairing the obligation of Contracts."

The word "pass," may be synonymous with, "create," or "put into effect."

The Point that the application of the New York Statute to Young in this case "impairs the obligations of contract" cannot be evaded by suggesting that the Statute may have been enacted before Young made his contract of bailment in New Jersey. The Statute may have existed in New York, but it did not exist in New Jersey, prior to Young's contract. It was the "application" of the New York Statute to Young after the contract had been made, of which he complains; the New York Statute had no operation in the State of New Jersey at the time the contract of bailment was made, no more than if it had not yet been enacted in New York; it was the dragging of the New York Statute over the state line into New Jersey, and its application there to Young after his contract was made, which violates the "contract" clause of the Constitution; in other words, no Statute of New York existed in or operated in New Jersey when Young made his contract of bailment; the law of New Jersey at once attached to that contract and protected Young from liability for the bailee's negligence; it was the drawing of the New York Statute over the state line after the contract was made, and giving it its first operation in New Jersey after the contract was, by its application to Young by the

Courts of New Jersey, which impaired his contract: and whether this was done by New York officials or New Jersey officials or a combination of both, is immaterial; it is in any event the action of a State, which has impaired the obligations of Young's contract, in violation of the clause of the Constitution. Neither a single State, nor any combination of States, can wipe out a constitutional right.

The appellant Young was not and had not been in the State of New York; he had no knowledge of the law of New York and was not chargeable with such knowledge, because he was never within the jurisdiction of the Statute's operation; Young was no more chargeable with knowledge of the law of New York, than was the Court in New Jersey; the law of New York had to be proved even to the Court by the introduction of evidence. Balbino, the driver of the car was not Young's agent; was not engaged on any of Young's affairs, the automobile was not being driven for Young, nor about his business; the loan of the automobile was a valid contract of bailment under which Young was protected from liability for the negligence of Balbino by the Law of the State where the contract of bailment was made.

> "Owner not in automobile, being driven by another to whom he had loaned it to bring latter's wife and child from another city, at time of collision, is not liable for injuries to occupant of another car." Gavin *vs.* Cohen, 136 Atl. 330.
>
> See also, N. Y. L. E. and W. R. R. Co. *vs.* N. J. Electric R. Co., 60 N. J. L. 338;
> Doran *vs.* Thompson, 76, N. J. L. 754;
> Maurer *vs.* Brown, 106 N. J. L. 284, 285.

The fundamental premise, inherent in the case is, a contract of bailment is made, the bailee drives off

with the car; and the Law of the State of New Jersey exempts and protects Young from liability for what the bailee does with it.

Young engages in no further activity, does nothing more; so that there is no act of his which can deprive him of his protection and render him liable. What is there then which can strike out his exemption from liability which the lex loci contractus affords him, and impose liability upon him? Can the laws of a sovereignty within whose territory he never was, and under the operation of which he had never come, change his status and impose a personal liability upon him? It is not a question whether the automobile itself could be forfeited under the Law of New York for being in the State of New York, although without the owner's knowledge or consent; perhaps it could be forfeited. The question is, whether he who was never in New York, and whether other property of his which was never in New York, are amenable to the Laws of New York, which laws never reached over either him personally or over his other property, for the reason that neither he nor it was ever within the limits of their territorial operation.

The immunity from liability for the bailee's negligence, which under the Law of New Jersey Young enjoyed, is unaffected by any act of his, for he did no act which affected it after Balbino drove away with the car; this immunity from that negligence remains, and continues to exist, as matter of law, unless it is obliterated and destroyed by the operation in the State of New Jersey of a Statute of New York. Can this be?

STATE STATUTES HAVE NO EXTRA TERRITORIAL OPERATION

That the laws of a state or sovereignty have no extra territorial operation is axiomatic.

> "Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction." Sanford *vs.* McDonald, 248 U. S. 185 at 195. 63 L. Ed 200-204.
>
> "The foregoing considerations would lead in case of doubt to the construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the law-maker has general and legitimate power. All legislation is prima facie territorial." American Banana Co. *vs.* United Fruit Co., 213 U. S. p. 347-357, 53 L. Ed. 832.
>
> See also, Pennoyer *vs.* Neff, 95 U. S. p. 714, 24 L. Ed. 565.

It is not a question of the validity of the New York Statute within the limits of the State of New York, if applied to either persons or property within the territorial limits of the State of New York; its validity with respect to such persons and such property may be conceded. But the Court below declined to so limit that statute's operation; the trial court instructed the jury (R. 80) that the New York Statute operated to render Young liable for the bailee's negligence, although Young had never been in the State of New York either actually or constructively; although he believed the bailee would not go into New York; although the bailee Balbino was not Young's agent either by express appointment or by implication; and that although Balbino was not engaged upon Young's business, yet Young was liable in any event, merely because he was the owner of the car.

How could the Courts below have so decided except by giving extra teritorial operation to the New York Statute? The appellee Masci, seems to have urged upon the Courts below, that the question was one of "comity" between states; his idea seems to have been, that the courts of one state will within their own jurisdiction, give active, operative effect to the statute of another state. Such a claim, is at least an inadvertence; there is not and never was any such rule of "comity" in the sense that a state statute could extend over the state line and either deprive a non-resident of an existing right *in personam,* or impose a personal liability upon him. In support of this claim below, were cited cases where statutory causes of action for wrongful death, are enforced in the courts of a state other than that in which the wrongful death occurred; but in none of them was there applied a statutory liability against one who had never been in the State which enacted the Statute.

It is quite true, that the Courts of one state will enforce a transitory cause of action arising in another state; but this is enforcing an existing personal right arising out of the "lex loci"; it is not giving extra-territorial operation to a law, by applying it so as to create a cause of action in another State.

The question of the power to extend the operation of a state statute beyond the territorial limits of the state is directly met and disposed of in N. Y. Life Insurance Co. *v.* Head, 234 U. S. 160, wherein the Court said:

> "* * * And this concession brings us to consider the second general inquiry, which is the power of the state of Missouri to extend the operation of its statutes beyond its borders into the jurisdiction of other states, so as in such other states to destroy or impair the right of persons

not citizens of Missouri to contract, although the contract could in no sense be operative in Missouri, and although the contract was sanctioned by the law of the state where made. That is to say, the right of a state where a contract concerning a particular subject-matter not in its essence intrinsically and inherently local is once made within its borders not merely to legislate concerning acts done or agreements made within the state in the future, concerning such original contract, but to affect the parties to such original contract with a perpetual contractual paralysis following them outside of the jurisdiction of the state or original contract by prohibiting them from doing any act or making any agreement concerning the original contract not in accord with the law of the state where the contract was originally made. In other words, concretely speaking, we must consider the validity of the loan agreement; that is, how far it was within the power of the state of Missouri to extend its authority into the state of New York, and there forbid the parties, one of whom was a citizen of New Mexico and the other a citizen of New York, from making such loan agreement in New York simply because it modified a contract originally made in Missouri. Such question, we think, admits of but one answer, since it would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that state and in the state of New York, and there destroy freedom of contract without throwing down the constitutional barriers by which all the states are restricted within the orbits of their lawful authority, and upon the preservation of which the government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question, and hence authorities directly dealing with it do not abound." 234 U. S. 161, 58 L. Ed. 1264.

The Court further said:—

> "It is illustrated as regards the right to freedom of contract by the ruling in Allgeyer *v.* Louisiana, 165 U. S. 578, 41 L. Ed. 832, 17 Sup. Ct. Rep. 427, and it finds expression in the decisions of this court affirmatively establishing that a state may not, consistently with due process clause of the 14th Amendment, extend its authority beyond its legitimate jurisdiction either by way of the wrongful exertion of judicial power or the unwarranted exercise of the taxing power." 234 U. S. 162, 58 L. Ed. 1264.
>
> "A state statute authorizing an assessment to be levied upon property for a local improvement, and imposing upon the lot owner who is a non-resident of the state, a personal liability to pay such assessment, is a statute which the state has no power to enact, as to enforce such personal liability would be a taking of property without due process of law and a violation of the Federal Constitution." C. P. Dewey *v.* City of Des Moines, 173 U. S. 193, 43 L. Ed. 665.

In discussing the sovereign powers of States, and the principles of public law which sustain them, the Court said:—

> "One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil status and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also to regulate the manner and conditions

upon which property situated within such territory, both personal and real, may be acquired, enjoyed and transferred. The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. Story Confl. L., ch. 2; Wheat Int. L., pt. 2, ch. 2. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. 'Any exertion of authority of this sort beyond this limit,' says Story, 'is a mere nullity, and incapable of binding such persons or property in any other tribunals.' Story, Confl. L., sec. 539. Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 568-569.

Actions in tort are in their nature transitory; in transitory actions liability may be enforced wherever the person against whom liability exists can be found; but "comity" can never impose liability upon one against whom by the law of his situs no liability exists; and in this case, no liability for Balbino's negligence rested upon the appellant Young under the Law of New Jersey, and no liability for that negligence could exist without giving to the New York Statute the effect of reaching over into the State of New Jersey and imposing upon Young the very liability from which he was protected by the law of the state in which all his actions were performed and his contract made. To enforce outside of the State of New York a cause of action against one

who was within the State of New York at the time of the occurrence, and therefore amenable to the Laws of New York is one thing; to carry the Law of New York over into the State of New Jersey and there impose upon one who was never in the State of New York and never amenable to its laws, a liability which the Law of New Jersey exempted him from, is quite another thing. There is no question in this case about whether Young expressly or impliedly consented to the operation of the Laws of New York over him personally by knowingly sending his automobile into that state; the trial court in its charge to the jury left Young no opening for escape upon this ground, for it charged the jury (R. 80) that Young was liable for the negligence of Balbino the bailee, if only, Young loaned his car to Balbino quite independent of where Balbino drove it, or intended to drive it; under the charge of the trial court Young was liable although Balbino had borrowed the car merely to drive it around the corner, under an express agreement with Young that he would not drive it into the State of New York

THE APPLICATION OF THE NEW YORK STATUTE TO THIS CASE OFFENDS THE 14TH AMENDMENT

"Nor shall any state deprive any person of life, liberty or property without due process of law."

The application of the New York Statute to Young in the State of New Jersey, deprives him of "liberty" to make in New Jersey, the State of his domicile, and to enjoy, a contract of bailment which is protected by the Law of that State, and under which contract the lex loci contractus protects him from liability for the negligence of the bailee; this

"liberty" to make and to enjoy contracts is protected by the 14th Amendment.

> "The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purpose above mentioned." Allgeyer *v.* State of Louisiana 165 U. S. 589, 41 L. Ed. 835.

In Adair *v.* United States 208 U. S. 161, the validity of an Act of Congress was brought in question; that Act undertook to make it a crime for an officer of an interstate carrier to discharge an employee from service simply because of his membership in a labor organization; in determining whether the Act of Congress was repugnant to the 5th Amendment of the Constitution, the Court in referring to the section of the Act in question said:

> "In our opinion that section, in the particular mentioned, is an invasion of the personal liberty, as well as of the right of property, guaranteed by that Amendment. Such liberty and right embrace the right to make contracts for the purchase of the labor of others, and equally the right to make contracts for the sale of one's own labor;" Adair *v.* United States, 208 U. S. 172, 52 L. Ed. 441.

In the Adair case the Court concluded that the Act of Congress in question was repugnant to the

"due process" clause of the 5th Amendment. The phraseology of the "due process" clause of both the 5th and 14th Amendments is identical; and as to the identity of the meaning of the "due process" clause in both Amendments, there can be no doubt; the 5th Amendment being a limitation upon the power of the United States, and the 14th Amendment upon the power of the States.

> "The restraint imposed upon legislation by the due process clauses of the 5th and 14th Amendments is the same." Heiner *v.* Donnan, et al. 225 U. S. 312, 76 L. Ed. 772.

In Coppage *v.* Kansas, 236 U. S. 1, the principles announced in the Adair case were approved, reaffirmed, and applied to a similar statute enacted by the State of Kansas; the state statute was held repugnant to the "due process" clause of the 14th Amendment. In each the Adair and the Coppage case, the Court held that the restriction of the "liberty of contract" undertaken to be imposed by the statute in question, was repugnant to the "due process" clause of the 5th and 14th Amendments respectively.

In Coppage *v.* Kansas the Court said:—

> "Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense."
>
> 236 U. S. 14, 59 L. Ed. 446.
>
> "Competent persons ordinarily have the utmost liberty of contracting, and their agree-

ments voluntarily and fairly made will be held valid and enforced in the courts."

Twin City Pipe Line Co. & Ind. Oil & Gas Co. *v.* Harding Glass Co. 283 U. S. 353, 75 L. Ed. 1112.

"While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

Meyer *v.* Nebraska, 262 U. S. 399, 67 L. Ed., 1045.

"The right of employer and employee to contract with respect to wages is part of the liberty protected by the 14th Amendment to the Federal Constitution."

Charles Wolff Packing Co. *v.* Court of Industrial Relations of the State of Kansas, 262 U. S. 522, 67 L. Ed. 1103.

"The extra territorial operation given to the statute also takes Young's property without due process of law in violation of that amendment under the reasoning of the opinion in N. Y. L. Ins Co. *v.* Head, 234 U. S. 160, above quoted. Owing to the fact that New York cannot give its statute any extra territorial operation, that statute, as applied in this case, amounts to an imposition of liability which the State was without power to impose. It is to that extent as much a taking of property without due process of law in violation of the Fourteenth Amendment as was the attempted extra territorial tax referred to in Frick *v.* Pennsylvania, 268 U. S. 473."

To become amenable to constructive service under the New York statute providing for service on the Secretary of State in actions against nonresident automobile owners, the nonresident must either be operating the automobile personally, or the operation thereof must be through an agent or employee of such nonresident acting within the scope of his employment, and the operation of the statute does not extend to a person not associated with the nonresident owner by agency, but who is merely operating the automobile with the knowledge and consent of the owner. Zurich General Acci. & Liability Ins. Co. *v.* Brooklyn & Q. Transit Corp., 241 N. Y. Supp. 465.

And under this statute providing that in an action by a nonresident "growing out of any accident or collision in which such nonresident may be involved while operating a motor vehicle," summons may be served by leaving a copy with the Secretary of State, has no application to an accident which occurs while the car in question was being driven by a repair man, who had undertaken to locate trouble in the car, and who was not accompanied by the owner. O'Tier *v.* Sell, 252 N. Y. 400.

And a similar statute has been held to apply to the one actually operating the car, but not to the employer of one who had charge at the time when an accident occurred. Morrow *v.* Asher (1932; D. C.) 55 F. (2d) 365.

DENIAL OF EQUAL PROTECTION OF THE LAW

The State of New Jersey, through its Courts, in this case, denied the appellant Young the "equal protection of the law" of New Jersey guaranteed by the 14th Amendment. Everyone who makes in New Jersey a contract of bailment such as that at Bar, is protected by the law of New Jersey, from liability for negligence of the Bailee. But in this case, the courts of New Jersey denied Young this "equal protection," by imposing upon him the extra-territorial operation of a New York statute, which when so imposed upon him, denied him the operation and protection of the law of New Jersey. In order to violate the 14th Amendment it is not necessary that the act of the State should be through its legislative body in the form of a statute; the act of any person or authority vested with state power, is sufficient.

> "The 14th Article of Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains 'nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state, whether through its legislative, its executive or its judicial authorities." Scott *v.* McNeal, 154 U. S. 45, 38 L. Ed. 901.

In Carter *v.* Texas, 177 U. S. 442, 44 L. Ed. 839, a negro claimed that in a criminal trial in the state court he had been denied the equal protection of the laws in that the Jury Commissioners had deliberately excluded from the grand jury which found the in-

dictment, all persons of the African race; a motion to quash the indictment was made upon this ground, and the truth of the allegations were offered to be proven; but the Court declined to hear any evidence upon the point, and Carter was tried and convicted. The Supreme Court of the United States reversed the conviction upon the ground that the action of the trial court in declining to hear evidence in support of the charge and to quash the indictment if the charge was proven, denied Carter the equal protection of the law,

> "The exclusion of all persons of the African race from a grand jury which finds an indictment against a negro in a state court, when they are excluded solely because of their race or color, denies him the equal protection of the laws in violation of U. S. Const. 14th Amend., whether such exclusion is done through the action of the legislature, through the courts, or through the executive or administrative officers of the state." Carter *v.* State of Texas, 177 U. S. 839, 44 L. Ed. 442.
>
> "The prohibitions and guaranties of U. S. Const., 14th Amend., are addressed to, and control, not only the states, but also every person, whether natural or juridical, who is the repository of state power." Home Telephone & Telegraph Co. *v.* City of Los Angeles, et al. 227 U. S. 278, 57 L. Ed. 510.

See also:

Lee *v.* Hopkins, 118 U. S. 356, 30 L. Ed.

There seems to be no escape from the conclusions which are now to be stated:

1. Young, in the State of New Jersey made a legal and valid contract of bailment, under which the law

of the State of New Jersey protected him from liability for the negligence of the bailee, and the bailee departed with the object of the bailment.

2. Young did no other act or thing which could change his status or deprive him of this protection from liability, which attached to him by the law of New Jersey.

3. The Courts of New Jersey imposed upon Young the extra territorial operation of a New York Statute, the application of which statute in this case imposed a personal liability upon Young who had never been personally within the territorial operation of such statute, and a liability against his other property, which property had never been within the territorial operation of those laws. This, deprived him of liberty, and deprived him of property, "without due process of law."

4. The Courts of New Jersey denied Young the "equal protection of the law" of New Jersey, by denying him the protection from liability for the negligence of the bailee, which the law of New Jersey accorded him under the terms of the contract of bailment.

5. The New York Statute as applied in this case, violates the Constitution of the United States. For all or either of these reasons, that the judgment below should be reversed, is

Respectfully submitted,

DANIEL THEW WRIGHT,
R. ROBINSON CHANCE,
PHILIP ERSHLER,

Counsel for Appellant,
Chas. D. Young.

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CHARLES ELMORE CR

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 643

CHARLES YOUNG, APPELLANT,

vs.

ANTHONY MASCI.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

SAMUEL KAUFMAN,
Counsel for Appellee.

INDEX.

Subject Index.

	Page
Statement opposing jurisdiction	1
Nature of the case	1
Cases believed to make against jurisdiction	7
Motion to dismiss appeal	7

Table of Cases Cited.

Michigan Cent. R. Co. v. Michigan Southern R. Co. (1856), 19 How. 378, 15 L. Ed. 689	7
Miller v. Cornwall R. Co. (1897), 168 U. S. 131, 18 Sup. Ct. 34, 43 L. Ed. 409	7
Murdock v. Memphis (1874), 20 Wall. 590, 22 L. Ed. 429	7

Statutes Cited.

Judicial Code, Section 237 (a)	1
Laws of 1929 of the State of New York, Chapter 54, Section 59 (Chapter 71 of the Consolidated Laws)	2
United States Constitution, 14th Amendment	4

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 643

CHARLES YOUNG, APPELLANT,

vs.

ANTHONY MASCI.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

GROUNDS MAKING AGAINST THE JURISDICTION AND MOTION TO DISMISS APPEAL.

The appellee respectfully presents the following matters and grounds making against the jurisdiction of this Court asserted by the appellant to review the above entitled cause on appeal:

I.

Nature of the Case.

The appellant relies exclusively upon Section 237 (*a*), Judicial Code, the provisions of which are set out verbatim in appellant's Statement of Jurisdiction;

contending that in this cause there "is drawn in question the validity" of a statute of the State of New York, which statute is also set out at length in appellant's Statement of Jurisdiction.

This appellant, upon his appeal to the New Jersey Court of Errors and Appeals, assigned twelve grounds of appeal, to wit:

"1. The Trial Judge erred in admitting in evidence over the objection of counsel for the defendant, Exhibit P-4, which is a part of Section 59 of Chapter 54 of the Laws of 1929 of the State of New York, entitled, 'An Act relating to motor vehicles, motorcycles and highway traffic constituting Chapter 71 of Consolidated Laws,' the part of said Section so introduced reading as follows:

> " 'Every owner of a motor vehicle or motorcycle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle or motorcycle in the business of such owner or otherwise by any person legally using or operating the same with the permission express or implied of said owner.'

"to which admission in evidence exception was duly noted by defendant's counsel.

"2. The Trial Judge erred in denying defendant's motion for a non-suit, to which denial of motion exception was duly entered by defendant's counsel.

"3. The trial court erred in denying defendant's motion for a non-suit, whereas the same should have been

granted on the ground that it appears in the cause that Mr. Balbino was merely a bailee, and not an agent of Mr. Young, to which denial of motion exception was duly entered by defendant's counsel.

"4. The Trial Judge erred in denying the motion made by defendant's counsel for the direction of a verdict in favor of the defendant, to which denial of motion exception was duly entered by defendant's counsel.

"5. The Trial Judge erred in denying the motion made by defendant's counsel for the direction of a verdict in favor of the defendant which should have been granted upon one or more of the following grounds:

"First, that it appears in the case that Mr. Balbino had this car under a bailment made in New Jersey, and that at the time of operating the car when the accident occurred he was not the agent or servant in any sense of Mr. Young.

"Second, on the ground that it appears that the statute of New York, which has been offered in evidence in this case, is a penal act, and the rule of law is that the penal law will not be enforced in another State.

"Third, upon the ground that it appears that the claim of the plaintiff rests solely upon a statute of New York, which is in derogation of the common law, is not such as to be similar to any statute in this State, and which is in effect contrary to the rulings of our Court.

"Fourth, because it appears on its face that by a proper interpretation of the New York statute, Section 59 and the other sections which have been put in evi-

dence of the same statute, that the statute is not intended to concern bailments made in New Jersey and the relations and obligations of the bailor located in New Jersey.

"Fifth, because it appears from the evidence that Mr. Young was not in New York; that he made a bailment of his car in New Jersey; that the driver at the time of the accident was not Mr. Young's agent, and so to apply the law in New York as to make Mr. Young responsible for anything that Mr. Balbino did would deprive Mr. Young of his property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and would also deprive him of his liberty to contract and make contracts, in violation of the Fourteenth Amendment.

"Sixth, upon the ground that it appears in this case that the plaintiff was guilty of contributory negligence and that he did not exercise reasonable observation, reasonable judgment, as to how and when to cross the street, in view of the approach of an automobile which he had seen approaching; to which denial of motion exception was duly entered by defendant's counsel.

"6. The Trial Judge erred in charging the jury as follows:

> " 'Now, the accident happened in New York City, and the plaintiff claims that because of the statute in New York, a statute law, the bailor—meaning Mr. Young, the defendant—is liable in this case if there was any negligence on the part of Balbino which was the proximate cause of the accident and injuries, because this statute which was read to you creates a liability against

> the owner or bailor. And relying upon that New York law, the New York law has been offered in evidence in this case; that is, Section 59 of the law, or a part of Section 59.'

"to which portion of the Court's charge exception was duly entered by defendant's counsel.

"7. The Trial Judge erred in charging the jury as follows:

> " 'As I understand it, it is not disputed, under the evidence submitted in this case that the accident happened in the City of New York and the State of New York, and, therefore, under the rule of law I charge you that the laws of the state where the accident happened control with respect to liability.'

"to which portion of the Court's charge exception was duly entered by defendant's counsel.

"8. The Trial Judge erred in charging the jury as follows:

> " 'Section 59 of the Motor Vehicle and Traffic Act of New York, among other things, provides 'Every owner of a motor vehicle or motor-cycle operated upon a public highway shall be liable and responsible for death or injury to person or property resulting from negligence in the operation of such motor vehicle or motor-cycle, in the business of such owner or otherwise, by any person legally using or operating the same, with the permission, express or implied, of such owner.'

"to which portion of the charge of the Court exception was duly entered by defendant's counsel.

"9. The Trial Judge erred in charging the jury as follows:

> "'So I charge you that it is immaterial whether or nor the operator, Michael Balbino, was at the time of the accident operating the automobile of the defendant, Charles Young, on his own business or on Young's business. All that is necessary for you to find is that the operator, Michael Balbino, was at the time of the accident operating this automobile with the defendant's permission, either express or implied.'

"to which portion of the charge of the Court exception was duly entered by defendant's counsel.

"10. The verdict is contrary to law.

"11. The evidence submitted in this cause does not show any legal liability on the part of the defendant, Charles Young, for the negligence of Michael Balbino.

"12. The judgment in favor of Anthony Masci and against the defendant Charles Young, which has been entered in this cause, deprives the defendant Charles Young of his property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, and deprives him of his liberty to contract and to make contracts in violation of the said Fourteenth Amendment, and denies him equal protection of the law in violation of said Fourteenth Amendment."

From a reading of these grounds of appeal, it appears that the validity of the said statute of the State of New York was not questioned by the appellant and that the New Jersey Court of Errors and Appeals

was never called upon to determine whether the said statute was valid or invalid.

The only Federal question presented to the New Jersey Court of Errors and Appeals was whether, assuming the said statute to be valid, the Supreme Court of New Jersey had deprived the appellant of due process of law in that it had held him subject in the instant case to the operation of the said statute.

It is therefore apparent that the propriety of the ruling below is not reviewable by appeal, but that the proper method of review is by writ of certiorari.

II.

Cases Believed to Make Against Jurisdiction.

The following decisions of this Court are believed to make against jurisdiction of this cause on appeal:

Michigan Cent. R. Co. v. *Michigan Southern R. Co.* (1856), 19 How. 378, 15 L. Ed. 689;

Murdock v. *Memphis* (1874), 20 Wall. 590, 22 L. Ed. 429;

Miller v. *Cornwall R. Co.* (1897), 168 U. S. 131, 18 S. Ct. 34, 42 L. Ed. 409.

It is respectfully submitted that this Court has jurisdiction of this cause only by writ of certiorari and not on appeal.

III.

Motion to Dismiss Appeal.

Counsel for the appellee moves to dismiss the appeal in the cause above entitled on the ground that the

only authorized method for review in this Court of the decision of the New Jersey Court of Errors and Appeals in this cause is by writ of certiorari.

Respectfully submitted,

SAMUEL KAUFMAN,
Counsel for Appellee.

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Supreme Court of the United States

OCTOBER TERM, 1922.

No. 643.

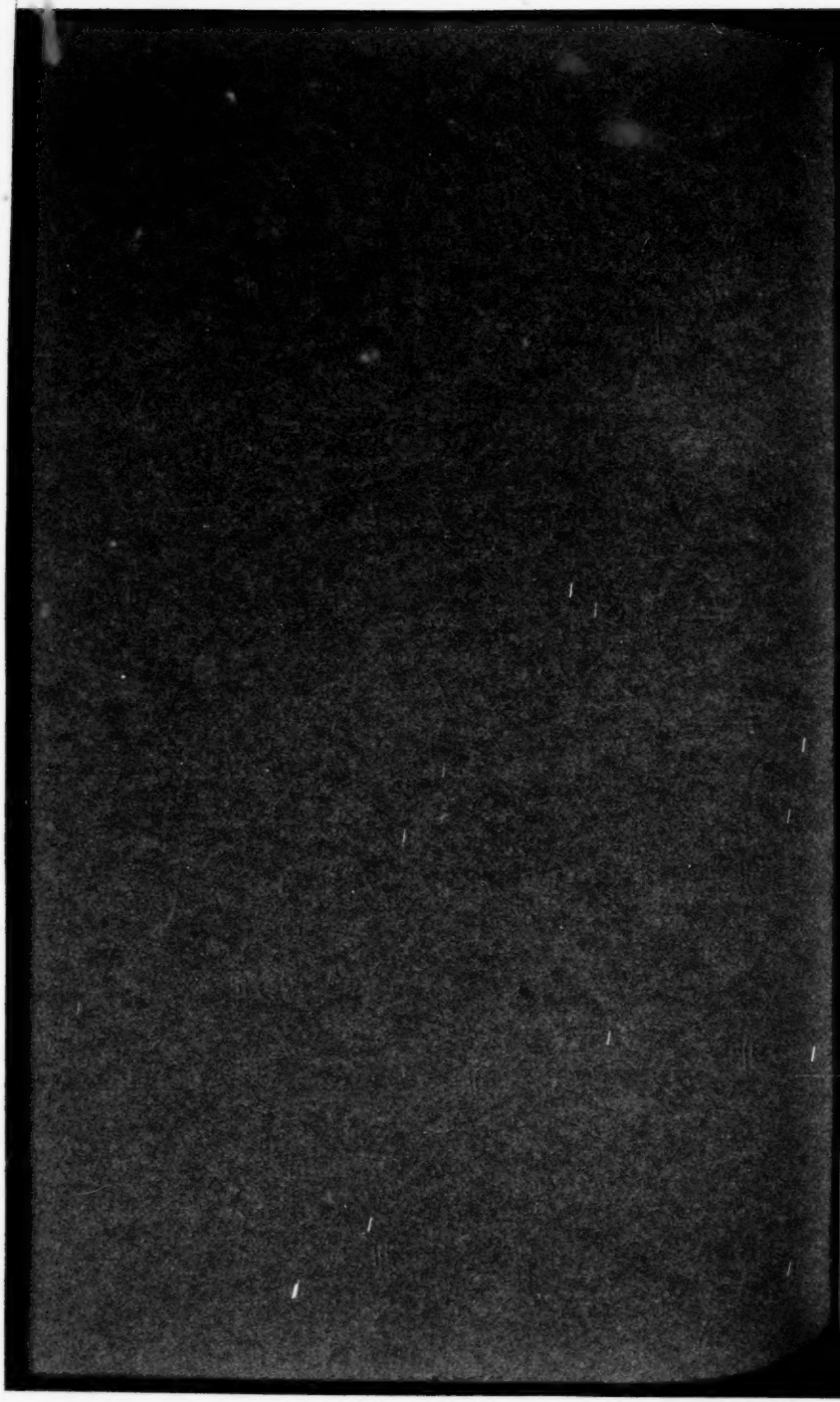
CHARLES YOUNG,
Appellant,

vs.

ANTHONY MASCI,
Appellee.

BRIEF FOR APPELLEE.

SAMUEL KAUFMAN,
Counsel for Appellee.



INDEX.

	PAGE
NATURE OF THE CASE	1
ARGUMENT	
The application of the N. Y. Statute Does Not Offend the Constitution	2

CASES CITED.

Brooks *v.* McNutt, 126 N. Y. Misc. 730	3
Coll *v.* Lehigh Valley Ry. Co., 3 N. J. Misc. 869, 102 N. J. L. 713	4
Downing *v.* New York, 219 App. Div. 444	3
Feitelberg *v.* Matuson, 124 N. Y. Misc. 595	3
Gleason *v.* White, 199 U. S. 54	4
Hawkins *v.* Bleakly, 243 U. S. 210	4
Hendrick *v.* Maryland, 235 U. S. 610	2
Hess *v.* Pawloski, 274 U. S. 352	2
Kane *v.* New Jersey, 242 U. S. 160	2
Kernan *v.* Webb, 50 R. I. 394	5
Masci *v.* Young, 109 N. J. L. 453	1
Pinney *v.* Nelson, 183 U. S. 144	7
Stapleton *v.* Ind. Brewing Co., 198 Mich. 170	3
Thomas *v.* Mathiessen, 232 U. S. 221	6, 7
Van Oster *v.* Kansas, 272 U. S. 465	3

OTHER AUTHORITIES CITED.

Blashfield Cyc. of Auto. L. 1318, sec. 3	3
7-8 Huddy Cyc. of Auto. L. (9th ed.), secs. 141 et seq.	3

SUPREME COURT OF THE UNITED STATES

October Term, 1932.

No. 643.

CHARLES YOUNG,
Appellant,

vs.

ANTHONY MASCI,
Appellee.

BRIEF FOR APPELLEE.

The opinion of the court below is reported *sub nomine Masci* v. *Young* in 109 N. J. L. 453, 10 N. J. Adv. Rep. #47, 162 Atl. 623.

Nature of the Case.

The facts are substantially as stated by appellant in his brief except as to the circumstances and nature of the bailment of his car. The important testimony of Irwin H. Simon relating to an admission made by appellant has been omitted:

> "Q. Where did he say the car was being driven? A. Mr. Young told me that he was told by Mr. Balbino that the car was going to be driven by Mr. Balbino with some of his relations to Rye Beach, New York." (R. 75)

That there was this testimony is recognized by Donges, J., in the opinion below:

> "There was some testimony that the appellant knew that Balbino intended to operate the car in the State of New York. The appellant denied such knowledge." (R. 92)

Appellant has further omitted his own testimony that Balbino came to him on a Saturday afternoon and asked to borrow the car for Sunday (the day on which this accident occurred); that Balbino told him he would bring it back Monday morning; that he (Young) had no objection to that (R. 44).

There was no testimony that "The thought that Balbino might possibly drive the car out of the State of New Jersey never occurred to him (Young)." (Brief for Appellant 2). Nor did the court instruct the jury "That the New York Statute operated to make Young liable for the bailee's negligence, * * * although he believed the bailee would not go into New York." (Brief for Appellant 12). And since it is undisputed that Young gave Balbino the unrestricted use of his car for a day, it is difficult to understand how "under the charge of the trial court Young was liable although Balbino had borrowed the car merely to drive it around the corner, under an express agreement with Young that he would not drive it into the State of New York". (Brief for Appellant 17).

ARGUMENT.

The application of the New York Statute to the appellant in this case does not violate any of the provisions of the United States Constitution.

It is well settled that a state may regulate the use of motor vehicles on its highways, both by residents and non-residents. *Hendrick* v. *Maryland*, 235 U. S. 610, 35 S. Ct. 140, 59 L. Ed. 385; *Kane* v. *New Jersey*, 242 U. S. 160, 37 S. Ct. 30, 61 L. Ed. 222; *Hess* v. *Pawloski*, 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091.

Counsel for appellant apparently concedes that the statute in question is a reasonable exercise of the police

power of the State of New York. (Brief for Appellant 12). Whether it is a reasonable exercise of the police power has not, so far as we have been able to determine, been decided by this court. Similar statutes have been in effect since 1915, and in 1917, the Michigan courts in the case of *Stapleton* v. *Independent Brewing Co.,* 198 Mich. 170, 164 N. W. 520, L. R. A. 1918 A. 916, held that a statute substantially the same as the one here in question was valid. The New York statute has been held valid in *Feitelberg* v. *Matuson,* 124 N. Y. Misc. 595, 208 N. Y. Supp. 786; *Brooks* v. *McNutt Auto Delivery,* 126 Misc. 730, 214 N. Y. Supp. 562, and *Downing* v. *New York,* 219 App. Div. 444, 220 N. Y. Supp. 76. Similar statutes have also been upheld in the states of Rhode Island, Connecticut and California. See 7-8 Huddy Cyc. of Auto. L. (9th ed.), secs. 141 et seq. Blashfield Cyc. of Auto. L. 1318, sec. 3, and in *Van Oster* v. *Kansas,* 272 U. S. 465, 47 S. Ct. 133, 71 L. Ed. 354. Mr. Justice Stone, speaking for this court, said:

> "They have their counterpart in legislation imposing liability on owners of vehicles for the negligent operation by those entrusted with their use regardless of a master-servant relation. Laws of New York, 1924, Chap. 534; Michigan Publ. Acts, 1915; Act No. 302 § 29 (constitutionality upheld, Stapleton *v.* Independent Brewing Co., 198 Mich. 170, L. R. A. 1918A, 916, 164 N. W. 520). They suggest that certain uses of property may be regarded so undesirable that the owner surrenders his control at his peril. The law thus builds a secondary defense against a forbidden use and precludes evasions by dispensing with the necessity of judicial inquiry as to collusion between the wrongdoer and the alleged innocent owner."

We contend that appellant has consented to the operation of this statute in that (1) He knew at the time when he lent the car that Balbino intended to go to New York, (2) He permitted Balbino to use his car for a day.

(1) The court charged the jury

> "All that it is necessary for you to find is that the operator, Michael Balbino was at the time of the accident operating this automobile with the defendant's permission, either express or implied * * * If you find that the operator, Balbino, was driving this automobile at the time of the accident with the permission of the defendant, either express or implied, you must then determine the question of negligence * * *." (R. 80)

Bearing in mind that it is undisputed that Young lent Balbino his car to use on Sunday, the day on which this accident occurred, the only meaning of the portion of the charge just quoted and the one that the jury must have understood is that in order to find for the plaintiff (Appellee) they must find that Young knew Balbino intended to take the car to New York and the verdict being for the appellee, the jury must have so found. If this was not the meaning of the court's charge and the court did fail to submit the issue of Young's knowledge to the jury, the failure so to do was not objected to by appellant; nor did he submit any request to charge on this issue, thereby under the law of New Jersey, waiving his right to have the said issue submitted to the jury. *Coll* v. *Lehigh Valley Ry. Co.*, 3 N. J. Misc. 869, 130 A. 225 affd. 102 N. J. L. 713, 132 Atl. 922.

Further, the failure of the court to submit this issue to the jury did not deprive appellant of any right secured to him by the Constitution of the United States (*Hawkins* v. *Bleakly*, 243 U. S. 210, 37 S. Ct. 255, 61 L. Ed. 678). This court has held that it will review findings of fact only when it discovers that there is no legal evidence to support the findings (*Gleason* v. *White*, 199 U. S. 54, 25 S. Ct. 782, 50 L. Ed. 87). The proof by the witness Simon of the admission of the appellant was sufficient to support the finding that Young knew at the time he lent the car that Balbino intended to take it to New York.

(2) Assuming that Young did not know at the time he lent his car that the bailee intended to take the car to New York, nevertheless he consented to the operation of the laws of New York because having lent his car for a day he was bound to know that the one to whom he lent it might go outside the state of New Jersey, and he took his risk of what the law of those states to which his bailee would take his car might be.

In *Kernan* v. *Webb*, 50 R. I. 395, 148 A. 186, one Webb while in Roxbury, Mass., was in the habit of consenting that a Miss Young have the use of his car within the limit of fifty miles from Boston. Miss Young took the car into Rhode Island and while driving in the Town of Warwick in the said state, more than fifty miles from Roxbury, was involved in an accident. In Rhode Island there is a statute which provides in substance that whenever a motor vehicle is used or operated upon any public highway of that state with the consent, express or implied, of the owner, the operator in case of accident shall be deemed to be the agent of the owner. The defendant contended that the Rhode Island statute could not legally be applicable where the consent to the use of the car was given in a foreign state. The Supreme Court of Rhode Island in affirming a judgment for plaintiff, per Stearns, C. J., said:

> "The foundation of this statutory liability of the owner is the permission given to another to use an instrumentality which, if improperly used, is a danger and a menace to the public. The owner can avoid this liability by refusing to permit the use of his automobile by another. If he does permit such use, he can not avoid the consequences of the operator's negligence and escape liability therefor by secret restrictions of the right to use the motor vehicle. The statute has no extraterritorial effect. It does not come into operation until an accident happens on a public highway in this state * * * For the defense it is argued * * * that the defendant, whom plaintiff seeks to hold liable for the wrongful act of

> some other person, was not the principal under the law of principal and agent in Massachusetts, and consequently such relationship can not be created by the mere crossing by the automobile of the state line * * * The inquiry is not one of agency in another state, but whether the consent to use given in one state is a continuing consent for the use in this state * * * No discrimination is made by the statute between citizens of this state and those of other states, nor is the statute, in our judgment, unreasonable."

There are two reported decisions of this court in matters dissimilar to the case now before the court but which enunciate principles applicable here.

In the case of *Thomas* v. *Mathiessen*, 232 U. S. 221, 34 S. Ct. 312, 58 L. Ed. 577, defendant, a resident of New York, signed a subscription agreement reciting the intention of the subscribers to form a corporation in Arizona for the purpose of building and operating a hotel in California. The defendant became a stockholder of the corporation subsequently formed in Arizona in accordance with the subscribers' intention. By the law of Arizona, stockholders were not individually liable for the debts of the corporation and the subscription agreement and charter so provided. In California, stockholders were personally liable for the debts of the corporation in proportion to their holdings. The corporation built a hotel in California and later became insolvent. The plaintiff brought this action to recover of the defendant his proportionate share of a debt contracted by the corporation in California. This court held that the defendant was liable therefor.

Mr. Justice Holmes, speaking for the court in that case, said:

> "The building and carrying on of the California hotel was the main object for which the parties came together. When the defendant authorized that, he could not avoid the consequences by saying that he did not foresee or intend, or that he forbade them. He knew that California had laws and he took the

> risk of what they might be when, as we must hold, he gave his assent to doing business there." (P. 234 of 232 U. S., p. 584 of 58 L. Ed.)

Pinney v. *Nelson*, 183 U. S. 144, 22 S. Ct. 52, 46 L. Ed. 125, was a case in which the facts were substantially similar to *Thomas* v. *Mathiessen*, except that the defendants were residents of the State of California, who subscribed to stock in a corporation organized in Colorado. In that case this court also held that the defendant was liable for his proportionate share of the debt. Mr. Justice Brewer who delivered the opinion of the court said:

> "All that we here hold is that when a corporation is formed in one state and by the express terms of its charter it is created for doing business in another state, and business is done in that state, it must be assumed that the charter contract was made with reference to its laws; and the liabilities which those laws impose will attend the transaction of such business." (At 151 of 183 U. S. and 128 of 46 L. Ed.)

It appears, therefore, that one who authorizes the performance in another state of an act which that state may regulate by the reasonable exercise of its police power, whether or not at the time of the authorization he knew that the laws of the said state regulated the act, thereby consents to the regulation in force in that state and is subject thereto. So here Young authorized Balbino to operate his car in New York where the operation of the car was reasonably regulated by the act in question and so was subject to the regulation.

We respectfully submit that the judgment of our New Jersey Court of Errors and Appeals was correct and should be affirmed.

Respectfully submitted,

SAMUEL KAUFMAN,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

No. 643.—October Term, 1932.

Charles Young, Appellant, *vs.* Anthony Masci.	On Appeal from the Court of Errors and Appeals of the State of New Jersey.

[April 24, 1933.]

Mr. Justice Brandeis delivered the opinion of the Court.

A New York statute provides: "Every owner of a motor vehicle or motor cycle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle or motor cycle, in the business of such owner or otherwise, by any person legally using or operating the same with permission, express or implied, of said owner." Laws N. Y. 1929, Vol. 1, p. 82; Vehicle and Traffic Law, sec. 59.

Masci, a citizen and resident of New York, brought this action in a court of New Jersey against Young, a citizen and resident of the latter State, to enforce liability under the above statute. The case was tried before a jury. It appeared that Young lent his automobile to Michael Balbino for a day without restriction upon its use, the contract of bailment and delivery of the car being made in New Jersey; that Balbino took the car to New York; and that while driving there negligently he struck Masci. There was evidence to justify a finding that the car was taken to New York with Young's permission, express or implied. Young moved for a directed verdict on the ground that the bailment was made in New Jersey; that he was not in New York at the time of the accident; that Balbino was not his agent or engaged on business for him; and that to apply the law of New York and so make the defendant responsible for something done by Balbino in New York would deprive the defendant of his property and his liberty without due process of law, in violation of the Fourteenth Amendment. The presiding judge declined to direct the verdict; ruled that if

negligence was proved, the law of New York was controlling on the question of liability; and charged that the defendant was responsible if the operator "was driving this automobile at the time of the accident with the permission of the defendant, either express or implied." The jury found a verdict for the plaintiff; and the judgment entered thereon was affirmed by the highest court of that State. 109 N. J. L. 453.

Young appealed to this Court on the ground, among others, that the statute as applied violates the due process clause of the Fourteenth Amendment. He does not challenge its constitutionality on the broad ground that an owner cannot be made liable for the driver's negligence unless the relation of master and servant exists. The contrary had been held in New York in respect to this statute. *Downing* v. *New York*, 219 App. Div. 444, 446, affirmed, 245 N. Y. 597; *Dawley* v. *McKibben*, 245 N. Y. 557. And in *Van Oster* v. *Kansas*, 272 U. S. 465, 467, where it was held that the due process clause does not prevent a State from forfeiting property of an innocent owner for the unauthorzied act of one to whom he has entrusted it, the Court states that it is not "uncommon for the law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one to whom he has entrusted it;" and refers to the legislation of New York "imposing liability on owners of vehicles for the negligent operation by those entrusted with their use, regardless of a master-servant relation." Compare *Pizitz Co.* v. *Yeldell*, 274 U. S. 112, 115-116. Statutes of like character have been sustained also by the highest courts of other States.[1]

Nor does Young question the State's power to regulate the use of motor vehicles of non-residents on its highways. Compare *Hendrick* v. *Maryland*, 235 U. S. 610; *Kane* v. *New Jersey*, 242

[1]Levy *v.* Daniels' U-Drive Auto Renting Co., 108 Conn. 333; Seleine *v.* Wisner, 200 Iowa 1389; Stapleton *v.* Independent Brewing Co., 198 Mich. 170 (compare Hawkins *v.* Ermatinger, 211 Mich. 578); Kernan *v.* Webb, 50 R. I. 394. Statutes in South Carolina and Tennessee subject the vehicles to a lien for damages resulting from negligent operation under certain circumstances. See Ex parte Maryland Motor Car Ins. Co., 117 S. Car. 100; Parker-Harris Co. *v.* Tate, 135 Tenn. 509. A California statute imposes in the case of negligent operation by a minor, liability upon the parent or guardian who has signed the minor's application for a license. See Buelke *v.* Levenstadt, 190 Calif. 684.

U. S. 160. He challenges the statute only as applied to a non-resident owner who made the bailment outside the State of New York and who was not within it at the time of the accident. The contention is that subjection of the owner to liability under the New York law deprives him of immunity from liability to third parties which he had acquired in New Jersey by virtue of the contract of bailment made there; and that thus the statute deprives him of his liberty to contract and his property without due process of law. If such a contract can be found in the case at bar, the statute does not purport to affect it. The statute neither forbids the making nor alters the terms of any contract. Compare *Home Insurance Co.* v. *Dick*, 281 U. S. 397. It does not purport to affect rights as between owner and bailee. Moreover, the contract of bailment could not have conferred upon the owner immunity from liability to third persons for the driver's negligence. Liability for a tort depends upon the law of the place of the injury; and (apart from the effect of the full faith and credit clause, which is not here involved) agreements made elsewhere cannot curtail the power of a State to impose responsibility for injuries within its borders. Compare *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145, 154. Thus the essential question is the power of New York to make the absent owner liable personally for the injury inflicted within the State by his machine.

When Young gave permission to drive his car to New York, he subjected himself to the legal consequences imposed by that State upon Balbino's negligent driving as fully as if he had stood in the relation of master to servant. A person who sets in motion in one State the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury whether the means employed be a responsible agent or an irresponsible instrument. The cases are many in which a person acting outside the State may be held responsible according to the law of the State for injurious consequences within it. Thus, liability is commonly imposed under such circumstances for homicide, *Commonwealth* v. *Macloon*, 101 Mass. 1; for maintenance of a nuisance, *State* v. *Lord*, 16 N. H. 357, 359; for blasting operations, *Cameron* v. *Vandergriff*, 53 Ark. 381, 386; and for negligent manufacture, *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382.

The power of the State to protect itself and its inhabitants is not limited by the scope of the doctrine of principal and agent.

The inadequacy of that doctrine to cope with the menacing problem of practical responsibility for motor accidents has been widely felt in cases where the injurious consequences are the immediate result of an intervening negligent act of another. Some courts have held, in actions against the owner for injuries resulting from the driver's negligence, that a presumption of the employment relationship arises from the fact of ownership;[2] or that, if the relationship is proved, a presumption arises that the accident occurred within the scope of the employment.[3] Many courts have extended responsibility, without the aid of legislation, by imposing liability upon the owner for injuries resulting from the negligent operation of the car by a member of his family.[4] In some States, including New York, the problem was left to the legislature. See *Van Blaricom* v. *Dodgson*, 220 N. Y. 111, 117. Its statute makes mere permission to use the car the basis of liability in case of negligent injury. We have no occasion to decide where the line is to be drawn generally between conduct which may validly subject an absent party to the laws of a State and that which may not. No good reason is suggested why, where there is permission to take the automobile into a State for use upon its highways, personal liability should not be imposed upon

[2]Louis *v.* Johnson, 146 Md. 115, 118; Tischler *v.* Steinholtz, 99 N. J. L. 149, 152; West *v.* Kerr, 88 Ore. 247; Griffin *v.* Smith, 132 Wash. 624; compare Freeman *v.* Dalton, 183 N. C. 538.

[3]Benn *v.* Forrest, 213 Fed. 763; Foundation Co. *v.* Henderson, 264 Fed. 483; Penticost *v.* Massey, 201 Ala. 261; Wood *v.* Indianapolis Abattoir Co., 178 Ky. 188.

[4]Hutchins *v.* Haffner, 63 Colo. 365; Stickney *v.* Epstein, 100 Conn. 170; Griffin *v.* Russell, 144 Ga. 275; Steele *v.* Age's Administratrix, 233 Ky. 714; Plasch *v.* Fass, 144 Minn. 44; Linch *v.* Dobson, 108 Neb. 632; Boes *v.* Howell, 24 N. Mex. 142; Grier *v.* Woodside, 200 N. Car. 759; Ulman *v.* Lindeman, 44 N. Dak. 36; Davis *v.* Littlefield, 97 S. Car. 171; Birch *v.* Abercrombie, 74 Wash. 486; Jones *v.* Cook, 90 W. Va. 710.

Compare the liability for harm done by a "dangerous instrumentality" entrusted by the defendant to an employee but not used, at the time of the injury, in the course of the employment. Barmore *v.* Railway Co., 85 Miss. 426, 448; Stewart *v.* Cary Lumber Co., 146 N. Car. 47; Railway Co. *v.* Shields, 47 Ohio St. 387, 392. Compare also the liability of a contractee for harm caused by an independent contractor in the performance of work "inherently dangerous." Norwalk Gaslight Co. *v.* Borough of Norwalk, 63 Conn. 495; City of Joliet *v.* Harwood, 86 Ill. 110; Bonaparte *v.* Wiseman, 89 Md. 12, 21-22.

the owner in case of injury inflicted there by the driver's negligence, regardless of the fact that the owner is a citizen and resident of another State. Compare *Thomas* v. *Matthiessen*, 232 U. S. 221, 234-235.[5]

The claim is made that the statute as applied violates the equality clause of the Fourteenth Amendment, because in New Jersey, under a contract of bailment made within the State, other citizens are protected from liability for the negligence of the bailee. Obviously there is no denial of equal protection, since all who permit their cars to be driven in New York are treated alike. A claim is also made that the statute as applied violates the contract clause of the Federal Constitution, because it impairs the obligation of the contract of bailment made in New Jersey. As it does not appear that any claim under the contract clause was made below, we need not consider the answers to this contention.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[5]Compare the scope of the jurisdiction of the courts of a State over nonresidents in actions based on the operation of motor vehicles within the State. Hess *v.* Pawloski, 274 U. S. 352; Kane *v.* New Jersey, 242 U. S. 160.